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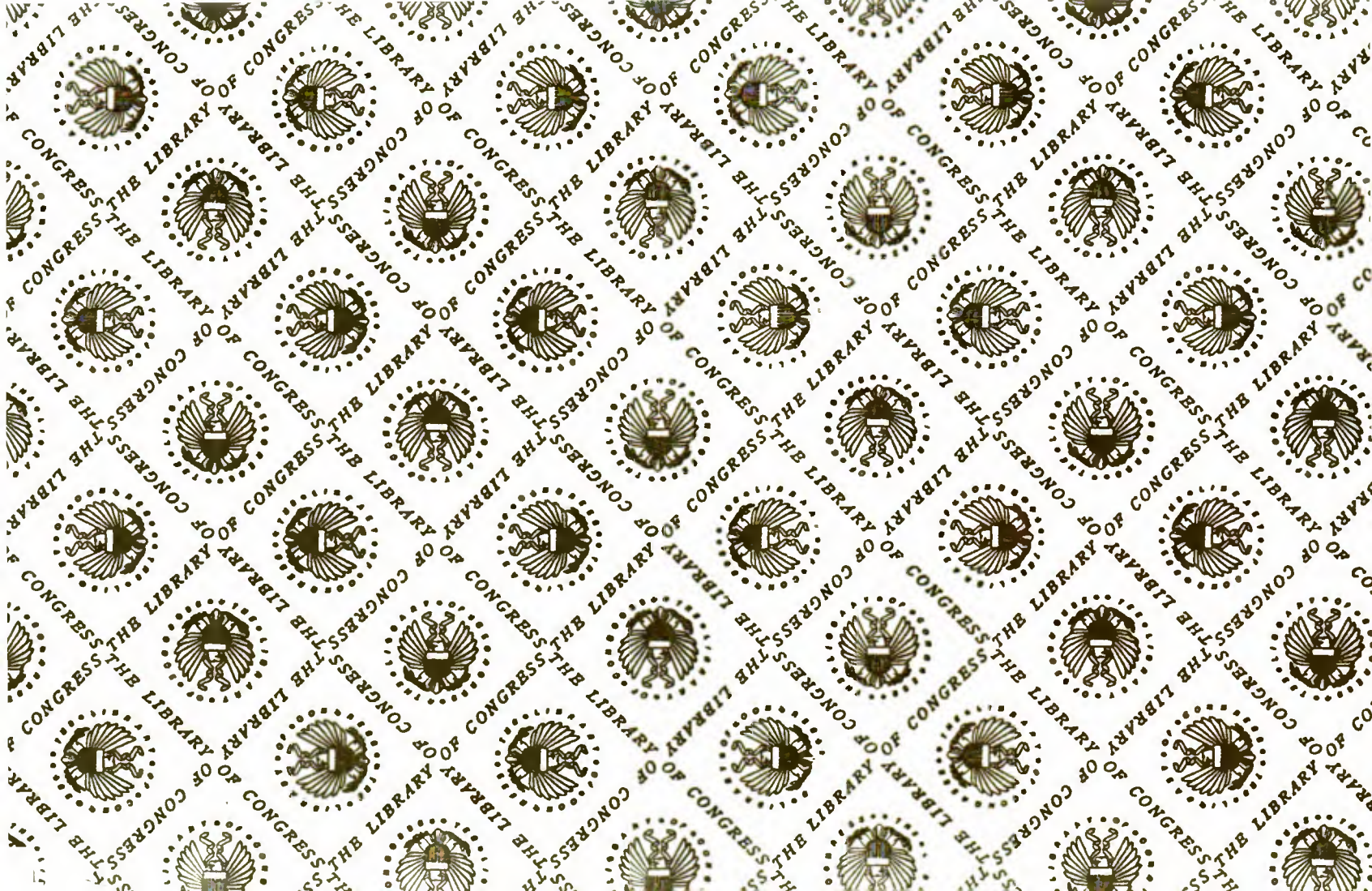
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LIBEL

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

LIBEL

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LIBEL

WEDNESDAY, FEBRUARY 26, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY.
Washington, DC,

The subcommittee met, pursuant to call, at 9:45 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Congressmen Edwards, Sensenbrenner, Schumer, and Schroeder.

Staff present: Catherine LeRoy, chief counsel.

Mr. SCHUMER [presiding]. The hearing of the Civil and Constitutional Rights Subcommittee will come to order. I am Congressman Charles Schumer. Chairman Edwards will be shortly—in fact, right now. Good. I didn't want to do this.

Chairman Edwards will be here shortly, as I was saying, and here he is.

Mr. EDWARDS. You did a very good job.

I apologize for being late. As Andy Maguire knows, we try to do nothing on Mondays, Tuesdays, Thursdays, and Fridays here, and we try to do everything on Wednesdays. It is really a fine way to run a store.

Today we begin a series of hearings on libel. Our purpose is to generate discussion about current American libel law and to explore various alternatives to it. In 1964, the Supreme Court held that the first amendment guarantee of a free press required that a public official suing for libel must show that the allegedly libelous statement was made with knowledge of its falsity or with reckless disregard for truth or falsity.

The landmark decision in New York Times against Sullivan injected a new, constitutional dimension to libel, at least as it affected public officials and later, public figures. From 1964 on, two important American values—the first amendment and individual reputation—have come into conflict in our courts as judges and juries have struggled to weigh the rights of a free press against the right of people to protect their reputations.

The Sharon, Westmoreland, and Tavoulareous trials of last year intensified the public debate on this issue and brought it out of academia into our living rooms on the nightly news. I believe it is safe to say the results of these cases dissatisfied everybody.

In these hearings, we hope to examine some of the problems those cases and others like them reveal and to determine whether there are other alternatives to the current state of the law, and whether or not they exist. We begin today by looking at how the law of libel has affected a number of real people on both sides of the issues.

The witnesses before us have been, and in some cases, still are, affected by libel on a daily basis. I read in the paper this morning about one case that has been going on 13 years, and the lawyer for CBS or NBC said, "It is going to put my son through college," the fees, and the son is only one year old.

Their situations may be less well publicized and their cases less glamorous than those of Sharon and Westmoreland, but taken together, their experiences probably represent the current state of the law with all of its problems, as well as or better than any of the cases which have drawn headlines.

I want to point out at this moment that the gentleman from New York, Mr. Schumer, has shown a very intense interest, a scholarly, in-depth interest in this subject. It is largely through his efforts, and I believe it is very much to his credit, that we are commencing this important set of hearings, because they are going to be important, and a very important record is going to be made.

With that, I recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

My comments this morning will not be directed toward the subject of the hearing, but more toward an overall procedural issue and an issue of basic fundamental fairness. It is not possible for the minority to participate in this hearing this morning, and the reason it is not possible is that the majority party has denied us adequate counsel of our choice to adequately prepare for this hearing, and to do the research that the three members of the minority party who serve on this committee need to have done on this very complicated issue of the law.

On February 1, Philip Kiko, who did serve with distinction as the minority counsel on this subcommittee, resigned to take a position with the U.S. Department of Education. Mr. Fish of New York, the ranking minority member and I, have nominated Alan Slaboden to be his replacement.

On Thursday as we all were leaving town, Chairman Rodino informed Mr. Fish that this nomination would not be approved and that the position left by Mr. Kiko's vacancy would not be filled. That means that the minority has no professional counsel to serve on this subcommittee. The majority has four professional counsel presently serving on this subcommittee.

Now, I have always been of the opinion that one of ours is as good of four of theirs, but in my opinion it is an outrage that one of the most important subcommittees in this House, and certainly one of the most important in the Judiciary Committee, is left without counsel.

Now, I think this is particularly outrageous because the majority party on this subcommittee have long advocated the right of all to have counsel of their choice, and adequate counsel of their choice when they are engaged in both criminal proceedings and civil pro-

ceedings in our court. But apparently what is good for the public as a whole is not good for the political opposition to the majority party on the Judiciary Committee.

With the departure of Mr. Kiko, the total Judiciary Committee staff is split 65 to the majority and 14 to the minority, a ratio of 4½ to 1, even though the ratio on the committee is 3 to 2. The majority party in the Senate, which happens to be my party, is much more realistic and much more benevolent on the allocation to staff to the Democratic minority in the Senate, than the Democratic majority in the House is to us.

Now, we all want to work within the guidelines of Gramm-Rudman, and certainly the Republicans on this subcommittee and on the Judiciary Committee as a whole in asking that Mr. Slaboden be paid less than Mr. Kiko, would save some money for the taxpayers and would allow the committee budget to be underneath the strictures of Gramm-Rudman, but to say that we can't have counsel whatsoever in the important proceedings in this committee, I think shows that power corrupts and absolute power corrupts absolutely.

I am serving you, Mr. Chairman, right now with a notice that if you want bipartisan support on any of the issues, important issues that come before this committee, we should have at least one counsel serving us. Until that time happens, the minority is not going to be participating in this subcommittee whatsoever.

[Mr. Sensenbrenner leaves the hearing.]

Mr. EDWARDS. I only want to observe that I carried Mr. Sensenbrenner's message to the chairman, who pointed out to me that there are no new hirings on the Judiciary Committee; that several of the subcommittees have vacancies. Mr. Hughes has one. Mr. Conyers has one, and at least one or two others, and that none of them will be filled, and that each of the parties, minority and the majority, has a pool of lawyers that can be reassigned, and that he has suggested to Mr. Sensenbrenner that Mr. Fish's pool of lawyers be asked to assign one of the lawyers to the committee to take Mr. Kiko's place, who was a very valuable addition to the subcommittee, as Mr. Sensenbrenner is, and of course, we are unanimous on the majority side in believing strongly that they should be represented.

We are going to do everything we can to have the minority counsel on this subcommittee.

Mr. Schumer, you have a statement.

Mr. SCHUMER. Yes, thank you, Mr. Chairman, and despite the fact that I don't have my own counsel on this subcommittee, I am not going to walk out.

Let me thank you first, Mr. Chairman, for holding these hearings on an issue that I have been interested in for a long time. I am appreciative to our witnesses for coming to this series of hearings. They promised to be the most extensive congressional exploration to date of libel law.

We begin today with testimony and first-hand accounts about what is really wrong with our current libel law in a very practical and real sense. After what I hope will be a series of three or four hearings by this committee with testimony from a broad range of witnesses, we will consider whether we should develop some con-

crete proposals on libel law reform. It may be that the law needs changing. Certainly very few people are happy with its present status. It may be that any change is for the worse, and I certainly, for one, haven't made up my mind as to which is better.

But the legislation that I have proposed, legislation that would permit public officials or public figures to sue, not for money, but for a judgment on whether an article or broadcast was true or false is certainly only one of a myriad of options that I hope this subcommittee will consider.

America was founded on the notion that we, as a people, should be able to say what we think and not be punished for it. But, early on, we established important guidelines for responsible expression. We also gave the individual the right to protect his or her reputation. Of course, a vibrant debate on controversial issues need for unjustly harm reputations. But frequently in these matters the lines are very fuzzy, and what a reporter may know to be fact, a general, or a congressman, may consider to be fantasy.

When the two sides do disagree, the conflict is fundamental and far-reaching. On one side are rights embodied in the first amendment, the cornerstone of our democratic society. On the other side are the rights of an individual, valuable rights recognized by generations of common law.

Something isn't working in this system today. There is general agreement that libel law can stifle and chill a free press, and our witnesses will reveal that today, and limit the ability of public officials or figures to seek redress, and again, another of our witnesses will indicate his trials and tribulations with that problem in the law.

Above all, the system demands too much money of both plaintiffs and defendants, and I might parenthetically add that the problems in libel law are not terribly different in certain ways, at least, from the problems in general tort and liability law. The costs are just overwhelming, and what was intended to be done by the laws doesn't just work for either side.

The potential cost of suits is one of the most troubling byproducts of current libel law. News organizations must divert scarce resources to defend against libel suits whether or not the claim has merit. Libel suits now cost an average of $150,000 to try, with three-quarters of the cost going for attorney's fees.

Plus newspapers that publish controversial allegations may face millions of dollars in damages if they are sued and lose. This is especially worrisome to small publishers who can be bankrupted defending against a single lawsuit. Thus, the cost of protracted litigation and the risk of damages threaten to deter news organizations from aggressive reporting.

Publishers generally agree that the threat of costs alone can produce a chilling effect which directly influences the media's ability to perform its job. And these looming costs can work against the other side as well. The high costs of litigation effectively limit an aggrieved plaintiff's opportunity for redress. Under the present system the only way a plaintiff can vindicate his or her reputation is to bring an action for damages.

Many public officials and figures cannot afford the costs of bringing a lawsuit with its attendant pretrail discovery and motion prac-

tice, let alone a long and costly trial. Thus, a public figure who is the subject of a single false news report may find a life's work destroyed, with no redress. This is particularly ironic because most plaintiffs claim that what they are interested in is not financial redress but simply a determination of truth or falsity by an independent forum.

Deficiencies in current libel law also threaten other first amendment interests, the independence of the press. News organizations are subjected to intrusive inquiries into their editorial process during both the discovery and trial phases of a case. The recent outcome of the suit involving the Washington Post and Mobil Oil is likely to increase the risk that investigative reporting may be chilled. The court said that a newspaper's general orientation toward "hard-hitting investigative stories" could, together with other evidence, support an inference that it was inclined to publish reckless falsehoods, the decision that I found an anathema to the way American works, but one that may very well be upheld by the Supreme Court.

Perhaps most troubling of all the implications of failure of our libel law is the role that they have played in American's loss of confidence in the news media. A recent poll commissioned by the American Society of Newspaper Editors disclosed that three-fourths of American adults do not trust credibility of men and women in print or on television who report the news. A senior vice president for Knight-Ridder Newspapers has said that the Nation's press has a serious credibility problem fueled by three sins: inaccuracy, unfairness and arrogance.

The press has exacerbated this problem by virtually avoiding any meaningful self-criticism. Many commentators have observed that if news organizations covered themselves as diligently as they do other institutions, there would be far fewer libel suits.

First amendment interests might well be best served by a first amendment solution—encouraging more debate rather than ignoring the problem. It seems probable that news organizations could constructively regulate themselves in the same manner that the ABA or AMA oversee the practice of law or medicine. An earlier attempt to do this failed; that was the National News Council. The idea may still have potential, another area we hope to explore in these hearings.

What is the future of our libel law? How extensive are the deficiencies? What are the workable remedies? Is it true that the present situation may be the best of a bad situation; you can't make things better? If we could design a new system today for resolving libel disputes, what would it ideally look like? What scenario would we like to see 10 years from now?

One scenario could be self-regulation or self-scrutiny. Another possibility could be mandatory arbitration. Others include changes in the law or authorizing public funds to pay for equal time or space. Finally, we could embrace the current system, as mentioned before, as the best possible choice.

The goal of these hearings is to bring adverse parties together to arrive at an approach or approaches that would be helpful to both sides and ultimately enhance enormous public interest in the free flow of accurate information and debate on public issues.

I thank the chairman.

Mr. EDWARDS. I thank the gentleman from New York.

Our first witness is a good friend and former colleague, Andrew Maguire, who was a Member of Congress, and a valued member from New Jersey from 1975 to 1981. Mr. Maguire is now vice president of the World Resources Institute here in Washington, DC.

Andy, we are delighted to have you back, if you will come over to the desk, raise your right hand—this is something new in the Judiciary Committee.

[Witness sworn.]

Mr. EDWARDS. Without objection, your full statement will be made a part of the record. You may proceed as you see fit.

STATEMENT OF ANDREW MAGUIRE, VICE PRESIDENT, WORLD RESOURCES INSTITUTE, WASHINGTON, DC

Mr. MAGUIRE. I am Andrew Maguire, a Member of Congress from 1975 to 1981, and also during that time a member of the House Commerce Committee's Oversight and Investigation Subcommittee.

I thank you, Mr. Chairman, for your invitation to me to appear today and for your and the committee's interest in this important issue, an issue, may I say, which I never expected to become personally familiar with.

Mr. Chairman and members of the committee, utterly false and defamatory statements were made about me and about the respected investigating subcommittee on which I served in a book published last year by William Morrow & Co. We were described as having participated in "damage control," and I, who served as chairman on December 16, 1980, as having "prevented" a path-breaking hearing on organized crime and toxic waste, "from pursuing many of the most important issues."

The intent and effect of the statements as they appear in the book, "Poisoning for Profit," by Alan Block and Frank Scarpitti, is to paint the committee and its members in this hearing as protectors of organized crime and those in government who traffic with it.

An extended negotiation conducted for the authors by the publisher's attorney resulted recently in a written repudiation by the authors of their most defamatory statements about my role at the hearing, a written promise from the publisher not to reprint these false statements, and payment of my legal fees by the publisher.

However, the book in uncorrected form is still being sold today because the settlement, involving letters from the authors and the publisher to me, was the best I could get with a skillful attorney under the quite unsatisfactory conditions created by existing libel law as it pertains to public officials.

Mr. SCHUMER. Would the gentleman yield for a second?

Mr. MAGUIRE. Yes.

Mr. SCHUMER. Would it be possible for you to submit those letters for the record.

Mr. MAGUIRE. If the committee so requests.

Mr. SCHUMER. I would make such a request.

Mr. EDWARDS. Without objection, it would be a very valuable addition to make.

Mr. MAGUIRE. Well, I do have copies of other correspondences, gentlemen, stretching over the period of time involved with this dispute, and I, with your permission, will be pleased also to make those additional items available to the committee if you so wish.

Mr. SCHUMER. I would so move, Mr. Chairman.

Mr. EDWARDS. Without objection.

Mr. MAGUIRE. I have them here if I could give them to the appropriate person.

[The information follows the witness' prepared testimony.]

Mr. MAGUIRE. Mr. Chairman, your invitation to appear to describe this experience, which is detailed in my written testimony and now the accompanying submissions for the record, and to speak about the lessons that I believe can be drawn from it, has led me to the following conclusions:

One, no one who is defamed should have to choose between the enormous costs, financial and otherwise, of suing for libel and the legal no-man's land I found myself in last year.

Two, the legal test for libel for a plaintiff who is a public official, which requires proof of malicious intent in addition to a showing of false and harmful statements, is so stringent as to be virtually unattainable even in the clearest cases of defamation.

Three, taken together, these costs and legal proofs create a situation in which a public official plaintiff of modest means and stature facing a defendant media organization with vastly superior resources, influence and power is, regardless of the merits, in a no-win situation in or out of court.

Four, in effect, the present libel law, with respect to public officials—theoretically designed to provide redress for those who are libeled, while protecting the guarantees of the first amendment—offers a virtual "license to libel" to those sloppy or unprincipled enough to take advantage of situations such as I have described, in which those who are libeled have few resources at their disposal.

Five, clearly there are also instances in which the disproportionate sources, influence and power of a public figure plaintiff may dwarf and intimidate a less well-endowed media organization regardless of the merits. But that is, again, a situation which derives from the extraordinary costs and legal tests described above: a partial victory or public embarrassment of the defendant, in some cases just the threat of these possibilities or of the potential costs whether the suit is won or lost, may serve the purposes of the more powerful party.

Six, regardless of which way the disproportionalities run, whether in favor of the media organization or the public figure, for the plaintiff or for the defendant, the present legal situation is one in which it is very difficult for the less powerful party to "win" or the more powerful party to "lose," regardless of the merits in or out of court.

Seven, the first amendment and other important American values such as fairness and individual rights are not honored or well-served by this situation. Yet, if the extraordinary costs of suing and the unrealistic, virtually unworkable legal test for public

figures could be modified without compromising the protections of the first amendment in any way, everyone would gain.

Eight, H.R. 2846, introduced and sponsored by Representative Schumer, does precisely this by establishing a new cause of action for a finding of fact and a declaratory judgment on a claim of defamation. Financial awards and the necessity to prove malice are set aside so that the determination may be strictly a factual one, thus eliminating or, at the very least significantly reducing the distortions introduced into the legal situation under current law as described above.

It also has the advantage that once a finding of fact is made and a declaratory judgment issued, neither party can continue with impunity to assert a different view of the facts or play games about their interpretation. Those who defame may also more readily submit to an objective review or even admit the fact of defamation where it clearly has occurred, rather than assume an inflexible legal position designed to forestall the potentially huge financial penalties of a successful suit against them, still a remote possibility under current law.

And, finally, libel claims that are not well-founded will also be less likely to be filed or pursued out of court, reducing wear and tear on everyone and costs overall.

Nine, the bill would be strengthened in my view if the declaratory judgment that defamation had occurred carried with it a requirement that the guilty defendant pay attorney's fees, withdraw any false materials not yet sold or broadcast, and add an errata sheet or other obviouis form of correction to those already sold which can be located (for example, in libraries or wherever purchasers can be identified) or broadcast a retraction of those already broadcast.

This is especially important if, as in subsection 1(d) of the current draft of H.R. 2846, the defendant may at his discretion convert action brought against him from a suit for libel to a declaratory judgment without the acquiescence of the plaintiff. This added requirement need not be an undue burden, especially if the judge has given some discretion in defining exactly what the guilty defendant will be required to do.

Ten, it may be argued that the proposed bill, or my proposed addition to it would somehow affect freedom of expression and first amendment guarantees. This argument is likely to be raised against any change in the law, no matter how modest or intelligent the proposed changes are. My view is that the changes proposed will have no negative impact on the first amendment; that indeed they will repair the damages both to the first amendment and to those who are libeled, which the enormous costs and potentially enormous financial awards and convoluted legal proofs of suits under current law inflict on both the first amendment and those who are libeled through a chilling effect, intimidation or the mere application of superior resources.

Compared with the current situation, H.R. 2846 and the additional provision I propose can only result in no, or at least far less, intimidation or chilling both theoretically and in practice than we have now—if these provisions are signed into law and plaintiffs

and defendants avail themselves of the option, as I would have and believe many others would, as well.

In conclusion, Mr. Chairman, I must make one final point. The first amendment is and must be sacrosanct. It is as close to an absolute as we have in our constitution and in the traditions of the practice of democracy in our nation. I know this committee shares this view, and would never seek to qualify in any way the protections of the first amendment as I would not. I do not believe that the causes of action for defamation posed by H.R. 2846 and the procedures it lays out or the refinements I have suggested go counter in any way to the provisions of the first amendment or the protections it guarantees.

But I am prepared to defer to the expert members of this committee and to authorities on constitutional law if there is any uncertainty about this. There can be no qualification of the intent or the effects of first amendment protections if we are to preserve the democratic system of government within a free society. If there is a balance to be struck between first amendment protections and the convenience, or even reputation of individual public figures who may be defamed in specific instances, as I have been, and balance, unquestionably, must lie with full protection of free expression.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. Maguire. I didn't know about this very unpleasant, devastating experience you have been through, but we certainly appreciate your coming here today and offer this immense on the bill.

Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. I too, am grateful for the witness coming forward and talking about his experiences, and my first group of questions relates to those specific experiences. You have made some quite strong statements here, and I think it would help the record and help the hearing if you could go over as best you can, very breifly, and thumbnail sketch a little bit more of the interplay. For instance, when did you first alert the publisher about the falsehoods in the book? What form did this notice take? What was the response? Did their response encourage or discourage you from suing for libel, for instance. A little more on the factual basis of the case, if you could talk about that at some length.

Mr. MAGUIRE. Sure. I first became aware of the impending publication of this book when I was telephoned by a senior staff person at the Oversight and Investigations Subcommittee who had a copy of the book in galley form. Given what he told me about what the book contained, I thought it was urgent that I look at the book immediately, and I had the copy of the relevant chapters of the book hand-delivered that very afternoon.

That was a Friday. I read the book over the weekend, and on Monday morning, placed a call to the publisher of William Morrow & Co. I was unable to reach Lawrence Hughes. I did reach his second in command, Sherry W. Arden, whose title was publisher—Lawrence Hughes' title was president—and told her that the book contained utterly false and defamatory statements.

Mr. SCHUMER. You had never been interviewed for the book.

Mr. MAGUIRE. No, this was the first that I knew of the book or any of its contents.

I asked her what the status of the book was at that moment, and I was told that it had been printed and was in warehouses, but would not be in book stores for several more weeks. It was not yet in book stores at that time. We checked book stores in Washington, New York and a couple of other locations across the country by telephone, and indeed the book was not in the book stores. It did not, in the event, arrive until the latter part of February, and the date of publication as published in "Publisher's Weekly" was February 22.

In any case, going back to January 14, in my conversation with Ms. Arden, I was advised to these facts and I advised her as to the errors and defamations contained in the book, and asked that William Morrow & Co. hold any further distribution of the book until I had an opportunity to acquaint them with the facts and indicated that I would have a complete memorandum on their desk before the end of the week.

I prepared that memorandum, sent it on the 17th of January. It was received by overnight mail by Morrow on the 18th of January. I had by this time also retained very skillful attorney, familiar with the libel laws and with the publishing business, Renee Schwartz of Botein, Hays and Sklar in New York. She entered into conversations with the publisher within 24 hours after my first conversation with them to start the negotiations.

Our first request, of course, was to meet with the publisher and with the authors to present the facts since the book was making false statements. From that point on I must say every step of the way, it took weeks and weeks and weeks. It took them—I don't remember how many weeks to schedule such a meeting. In the end, only one of the authors showed up.

The whole process was extremely debilitating. The publisher was never willing, to assume any responsibility beyond serving as some kind of a post office box between ourselves and the authors, in the person of their attorney, one Robert Callagy of Saterlee and Stephens, and it was an excruciating experience, Mr. Schumer, to have gone through, and it was bedeviled by the fact that we had so few resources, so little leverage in the situation.

We really had to simply make our points as forcefully as we could. We challenged them to produce any evidence on which they had made these statements. They were unable to produce anything other than the speculation summarized in one paragraph in my written statement. We, on the other hand, produced tons of evidence to the contrary, and ultimately I think the sheer weight of the preponderance of evidence must have convinced them that it made sense for them to come to a settlement of the sort that I described.

Mr. SCHUMER. That's my second question, to try to get the facts out here. You said in your testimony, that they sent a written promise to you not to reprint the false statements, as well as paid your legal fees. Yet you say in your testimony, "The book in uncorrected form is still being sold today because the settlement involving separate letters from the author and publisher was the best I could get." Would you elaborate on what the settlement really was?

Mr. MAGUIRE. Well, my attorney advised me at the very beginning that the publisher, in effect, had all the legal cards and that there was no real possibility that we could get them to hold the book from further distribution or withdraw the book from publication, and that the best that we could hope for in an out-of-court negotiation would be a retraction.

Mr. SCHUMER. A retraction in the book?

Mr. MAGUIRE. No, a retraction——

Mr. SCHUMER. In writing.

Mr. MAGUIRE. On paper in writing in a private communication from the authors to myself. I also insisted that the publisher send me a separate letter indicating that they would never reprint these falsehoods, which in effect they have done by sending this letter saying that they will honor the changes the authors now have indicated they would make in any future printing, and I insisted that my attorney's fees be paid. But there was no leverage. There was no basis for me to even hope that I could get the book stopped or withdrawn given the current state of libel law as it pertains to public figures.

Mr. SCHUMER. There was, though, no dispute at least that certain parts of the books were false and defamatory even on the other side, I presume.

Mr. MAGUIRE. Actually, they disputed everthing every step of the way—not as to the facts, but as to what they were willing to do. They came up with innumerable formulations, which I rejected, which were short of a repudiation. One of my favorite ones was along the lines of, "We know we are right, but we now see you have all of this evidence on the other side, and you are entitled to your view," which I did not regard as a repudiation, and I did not accept that text and insisted on one which explicitly took the words of the book as they appeared and said, you know, you did not intend to do and you did not do these things, that is to say——

Mr. SCHUMER. You got a letter that said that.

Mr. MAGUIRE. Yes, yes.

Mr. SCHUMER. Which you submitted into the record.

Mr. MAGUIRE. At your request, I have submitted it.

Although the authors interviewed no one who was in a position to know the facts; secondly, cross-checked none of the speculation that they heard from one person after they heard it; thirdly, cited no sources whatsoever in the book; and fourthly, provided no evidence to me in these discussions of any basis on which they could possibly have concluded the things that they stated in the book, they now say that they recognize that I did not intend to do, and did not do these things. That is to say I did not participate in damage control nor prevent the hearing from pursuing the most important issues. Both of those key defamatory statements have been repudiated now by the authors in writing.

But beyond that, the publisher as a separate party has assumed the posture in which they have tried to do the absolute minimum on paper themselves. Their attorney always said, when a proposal I offered was rejected; "the authors cannot accept it." There was never any statement as to what the publisher thought or cared to do or what the publisher saw as their responsibility. They have not assumed any direct responsibility for defamation in writing, al-

though they have, of course, conducted this negotiation, told me that they will not reprint what the authors now have repudiated, and thirdly, paid my legal fees. In effect, it seems to me, they assume some responsibility, but they won't admit anything directly on paper.

As recently as the last several days, as you will see in your package of submissions for the record, there has been an exchange of correspondence between Lawrence Hughes and myself. I sent my proposed testimony to him a week ago inviting his comments and indicating that I would place any comments that he might wish to make in the record along with my own statement.

Well, he did send me comments, which you have, and I sent him a reply—two letters in fact—one before and one after I received his written comments. And it is interesting to note that the publisher, even after all that I have described having occurred, is still attempting to take the position that when they published the thing in February they thought there was no problem, even though they had been advised as early as November 30, 1984, by letter from the subcommittee that the book contained the most outrageous falsehoods.

The publisher continued to maintain, and does even now, that they are responsible for nothing.

Mr. SCHUMER. Let me ask just somewhat of a technical question, but I am sure you have explored it, was it the malice standard, or was it a lack of resources that prevented you from getting everything that you wanted?

In other words, in your opinion, knowing the facts of this case, would you have been able—if you had unlimited resources, would you have been able to meet the malice standard?

Mr. MAGUIRE. Yes, I think that we would have been.

Mr. SCHUMER. That would be my opinion, too.

Mr. MAGUIRE. The publisher would disagree with that, I am sure, but I think we have them and the authors dead on with respect to the time periods involved here and reckless disregard of the facts. They maintain that they didn't know anything prior to what they say was their publication date, which is never specified, interestingly enough. We have the February 22 publication date that is shown in "Publisher's Weekly."

They maintain that the publication actually occurs at some earlier time when the books are printed and/or distributed, but they have never told us, not to this day, what that date was. It would be very difficult, I think, for them to argue in court that the date came prior to the November 30, 1984 letter from the subcommittee chief counsel, Michael Barrett, alerting them to the false and defamatory nature of the material in the book as it pertained to the subcommittee and to me specifically, and you have a copy of that letter.

Second, I think that even if the dates finally remained fuzzy we could show that they proceeded in a sufficiently reckless fashion with respect to the facts, even though they may have not "intended" to deliberately set out to defame me. They were sufficiently reckless, sloppy, unprofessional, in the way that their editors and the publisher overall handled the matter that we would have been able successfully to prove malice.

Mr. SCHUMER. Just to summarize, in your opinion it was not the malice standard itself, but the difficulty of actually through discovery and everything else proving that that led to your inability to get something.

Mr. MAGUIRE. I am a person of moderate financial means, and I would not have been able to retain legal counsel or pay the costs associated even with the early stages of such a suit.

Mr. SCHUMER. The next question I had is you seem to—you didn't say, but you seem to indicate in your testimony that it was your goal to see that the book be not published. Is that accurate?

Mr. MAGUIRE. Well, certainly——

Mr. SCHUMER. If you could have had your way.

Mr. MAGUIRE. Yes.

Mr. SCHUMER. My question, then is——

Mr. MAGUIRE. Or at least that it would have been published in a form in which people would read truth as opposed to falsehood. The book addresses an important subject. It is too bad, and it is a shame that it did it the way that it did.

Mr. SCHUMER. That leads to the obvious question, we are all in government. We all know two things: one, that when we enter government we are going to be subject to all sorts of discussion. In a sense, many of us who enter government welcome that. Second, it is very important for the government's functioning that all sorts of ideas just be thrown out there.

I have no reason to doubt that these allegations were just outrageous—I mean you are a person, I'm sure the record of your subcommittee will show, who fought to close toxic dump sites, and then somebody says you are controlled by some underworld force, and that's why you didn't finished doing it. But even assuming the outrageous——

Mr. MAGUIRE. We did finish a first rate investigation which had enormous impact, Mr. Chairman. Aside from that, I agree with your statement.

Mr. SCHUMER. OK. I'll let the record be corrected.

Doesn't it serve governmental purposes well to have all of this—have information, no matter how crazy it sounds—out there. I can understand where you might want some redress, but to say that this book should never have been published. Isn't that going to get us into very, very slippery and dangerous ground—or to say that the statements in the book should never have been issued. Doesn't that sort of smack of prior restraint?

Mr. MAGUIRE. I would be opposed to prior restraint in any form, Mr. Chairman. I think if you look at my record while a member of Congress, the American Civil Liberties Union and other groups who rate congressmen on matters pertaining to civil rights, civil liberties, on adherence to the Bill of Rights and the principles therein, you would find that I have a 100 percent or near 100 percent record. I am very committed, as my statement indicates, to the guarantees and the freedoms of the first amendment, and I would be in favor of no prior restraint.

By saying that I wished the book had not been published, I meant that of course I wished the book had never been written in this form and published in this form. But as a matter of redress, I would not ever go to court or advocate that legal duress be used to

prevent the appearance of a publication. What I am advocating in my statement is a procedure which I think your bill very thoughtfully develops where false and defamatory statements can be identified in an objective adjudicatory process after the fact, not prior—after the fact, and redress occurs at that point.

I have added the thought—as you see from my statement—that redress should include not just a statement of retraction that these statements were wrong and defamatory, but also, at the discretion of the judge, a withdrawal of what has been determined by a proper judicial process to be defamatory.

Mr. SCHUMER. Just one final question this round. I have plenty of other questions. I appreciate the chairman letting me run over my standard 5 minutes.

Let us say there was no recourse in terms of the courts, no libel law. What recourse would you have had? Let me just preface the question. It is often said, "You are a member of Congress, or a former member of Congress. You have far more ability to get your side of the story out than the average person, so what the heck are you complaining about?"

What kind of recourse would you and your situation have had other than this route, the legal route which you say insufficiently resolved your claims had? Would you have had any? Would you have held a press conference, for instance?

Mr. MAGUIRE. Yes. I would have had no recourse other than to hold a press conference and hope somebody might come.

Mr. SCHUMER. Would someone come, do you think, in your experience as an elected official?

Mr. MAGUIRE. Well, a handful of people might come, and it might be a one-day story in a few newspapers, perhaps in the immediate geographical area of my former congressional district. But what we are talking about here is a book which is reproduced by the thousands, sent all over the United States, if not all over the world, and read for the rest of time in libraries where somebody who goes in and reads the book cannot know that these key portions of the book have been repudiated even by the authors themselves.

Mr. SCHUMER. Mr. Chairman, I would yield back the balance of my time for the future.

Mr. EDWARDS. We'll go around and then get back to you because your line of questioning is very valuable.

Mr. SCHUMER. Thank you.

Mr. EDWARDS. I might add on the point that Mr. Schumer and Mr. Maguire just made that a little over 100 years ago in the House of Representatives, a Congressman walked over to a member from South Carolina who had made a speech that he didn't like. It was about his family, which was dreadfully personal, and beat him with his cane and put him in the hospital. I guess back in those days we didn't have any libel laws or anything else. That was the course of action that was appropriate. That was during the time that members carried pistols, too, so perhaps there some progress has been made.

What would you say, Mr. Maguire, about what is going on right now, a series of ads and throw-aways sent to certain congressional districts saying that Congressman X wants the Communists to take

over in Central America. His voting record shows it. He is not supporting the President, and that if Central America is Communist, it is Congressman X's fault. Is that libelous?

Mr. MAGUIRE. I've seen so much of that, Mr. Chairman, as I am sure you have, that I tend to smile about it, at least if the election isn't within a week. I would not think that kind of material would come under the kinds of procedures we are talking about here.

I mean garbage can be strewn about in various forms at any time by who knows who, or what somebody else might regard as not being garbage could be strewn around. That seems to me to be part of debate in a political process.

Mr. EDWARDS. It shows how difficult the process is.

Mr. MAGUIRE. Yes, it is.

Mr. EDWARDS. And what a tricky area we are in when we are talking about libel and slander.

Mr. MAGUIRE. In any case, that is part of the hurly-burly of a campaign. You can file a complaint, as you know, with the Federal Election Law Commission against an opponent if you can tie your opponent to the distribution of that kind of material, but of course it is transitory in nature and doesn't stay in libraries for hundreds of years as this book would.

I think it is a different case, and I am sure that with enough time I could come up with lots of legal arguments as to why it is quite different.

Mr. EDWARDS. I agree with you, but I appreciate your response.

Now the gentlewoman from Colorado has never been the subject of any libel or slander.

Mrs. SCHROEDER. I thank the gentleman for being here. I'm sorry I missed this testimony, but I will get busy and read it. Thank you very much, Mr. Chairman, for calling this hearing.

Mr. EDWARDS. Mr. Schumer.

Mr. SCHUMER. Thank you.

Let me just continue to pursue the line of questioning that we had. So you say calling a press conference wouldn't have been sufficient. Let's say the publisher had agreed ahead of time to put in an addendum saying, "Here is Mr. Maguire's view of what has been written here," or "Here is the view of the subcommittee counsel," and put in a letter, just by their own agreement, no coercion, although obviously there is legal force behind it. Would that have satisfied your——

Mr. MAGUIRE. Well, that is an interesting question. It certainly would have been a lot better. But I would have also hoped that they would, in a case where there was a clear dispute about the facts, have given some support to their own version of the facts, which of course they do not give, and have been unable to give.

Mr. SCHUMER. That would go to the malice standard really.

Mr. MAGUIRE. Yes.

Mr. SCHUMER. What other kinds of recourse might you envision being helpful to you that would be available to you?

Mr. MAGUIRE. I can't think of any others, Mr. Schumer, other than your proposed bill, if I may mention it once again.

Mr. SCHUMER. I'm glad it has one advocate out there. It seems the plaintiff's bar is against it. It is intended to provoke discussion and thought as opposed to being an actual vehicle for passage. I

don't think the Senate would pass the bill unscathed in this way anyway.

I asked you, but you didn't really answer it: what is your answer to those who say you entered politics at your own free will. America is known as a country where we all support open and free debate, and that is one of the prices you pay that you will be—and let's not use the word, "libeled,"—but many falsehoods will be uttered about you, and you have to expect that.

Let me just add another point to that—and it is far better for the good of the country that you suffer some of those slings and arrows than we limit debate in any way.

Mr. MAGUIRE. Well, I agree with your latter statement. I think the genius of your proposal, frankly, and if I may say also of my suggested addition to it, is that it does not limit debate in any way. In fact, even if there were indirect effects of having something like that on the books—which I don't concede—it would limit debate far less than debate is presently limited, in my view, as a result of the contortions and distortions of the present law on the process of free expression and open debate.

But having said that, let me go on to say that on page 6 of my written statement, I say, "A popular argument holds that under the first amendment, public officials are fair game for any comment, libelous or not." That is a fair paraphrase, I think, of what you asked me at the beginning of this particular question.

I happen to think we can do a little better than that. I think we can preserve the guarantees, the protections and the freedoms of the first amendment, and also provide after the fact, not prior, but after the fact, clarification by an objective body as to instances where false and defamatory statements have in fact been made, and we can eliminate the enormous costs and penalties that are actual or potential under existing law so that that process of adjudication will have less serious impact, far less serious impact, and perhaps no impact. We might even achieve a perfect world here where there would be no impact on the first amendment at all.

It is a question of which direction you are going. You can't naively sit here thinking that the present situation doesn't have some negative impacts on the first amendment and freedom of expression. And you are going to hear that from other witnesses, I believe, later this morning.

My argument is that we can do better for the first amendment and better for those who are defamed at the same time. Therefore we can move up our fidelity to not only the first amendment, but to individual rights and to fairness, to a variety of principles and rights and traditions that we hold here simultaneously.

You don't always have that opportunity. Ordinarily, you deal with difficult tradeoffs. I submit that this is not such a case.

Mr. SCHUMER. A question that is pretty obvious from your testimony, but if given a choice of money damages or somehow just a clearing of the air that these statements were not correct or unsubstantiated, you clearly choose—well, I don't want to put words in your mouth. Which would you choose?

Mr. MAGUIRE. Emphatically the latter, Mr. Chairman. I am interested only, I am interested solely, in a correction of the false and defamatory statements—period.

Mr. SCHUMER. And you did sue for money damages, I presume, but that was just——

Mr. MAGUIRE. Let me make sure you understand this never went to court.

Mr. SCHUMER. Right, I understand.

Mr. MAGUIRE. The whole negotiation was conducted outside of court because there were no satisfactory options for me within the court process as we have discussed. I threatened to sue, and I had a law firm ready to sue even though I didn't have any money to pay them. I think they understood that, or at least were willing to let me pay over a period of time. I threatened to sue, and if I had sued, I certainly would have sued to recover all of my costs.

I might have sued additionally for damages and pain and suffering or whatever one does, but I never got to that point, and that certainly was not my objective.

Mr. SCHUMER. My final question: was this first time this happended to you in your career? How widespread is it? We have all been criticized in the media in ads such as Chairman Edwards pointed out have come about, but how often has it happened in your long and—you certainly didn't stay away from the tough issues when you were here in Congress.

How often has it happened that this kind of thing happened, either to you or to others who you know about?

Mr. MAGUIRE. Well, this is the only time that it ever happened to me, and I distinguish this case in my testimony and in answering your question now from many other instances where one felt that one was not being completely or impartially treated with respect to what one's views actually were or what one had actually done on a particular piece of legislation, or whether one's record was being properly presented by one's opponent, or even in little handouts that somebody decided that they were going to distribute without putting their name on them.

This is a totally, totally different kind of case, and this is the only time that this kind of defamation has ever happened to me.

Mr. SCHUMER. One final question: if this occurrence, in the egregious way that it happended, as you have stated is very rare, should we risk monkeying around with the system when it may have other deleterious effects on the other side. And we will talk about that at future hearings with lots of people, but just your judgment.

Mr. MAGUIRE. I think that is a very good question, Mr. Schumer, and I have thought about that a lot. I think this kind of thing is happening too frequently. If you decide, and again I defer to more expert persons than mself, that I am correct that you can get benefits on both the first amendment side and the individual rights side simultaneously, then clearly there is no longer an argument against making some of those beneficial changes on the individual rights side.

My feeling is that it happens more than it should, this kind of either willfully malicious statements that the authors made, or if you want a generous interpretation, statements made as a result of the most sloppy and irresponsible possible approach to "scholarship." If you want to avoid that kind of sloppiness and inattention to rights and principles that we hold dear, it might be that a proc-

ess such as we have discussed here today would be very helpful at the same time that the First Amendment was honored more fully then it is today.

Mr. SCHUMER. I thank the chairman.

Mr. EDWARDS. Thank you very much, Mr. Maguire.

Mr. MAGUIRE. Thank you very much.

[The prepared statement and submissions of Mr. Maguire follow:]

Laying

Subcommittee on Civil and Constitutional Rights

Committee on the Judiciary

U.S. House of Representatives

Testimony of

Andrew Maguire

Member of Congress, 1975-1981

February 26, 1986

According to a page 1 story in the Washington Post's Book World section on April 7, 1985, Lawrence Hughes, President of William Morrow and Company, Inc., one of the nation's best known publishers, took a personal hand in editing The Double Man, a novel of the Washington power and fantasy genre authored by Senators Gary Hart and William Cohen. According to Cohen, "Larry Hughes was tough. He kept telling us, 'You have 80 percent of a good book.' His attitude was, 'I have plenty of good writers, and I'm not going to publish something by two senators unless it is top quality.'"

Just before release of the Hart-Cohen novel -- perhaps one of William Morrow and Company's flashier entries for the season -- and Mr. Hughes' comments about his personal involvement with it, another book was published by William Morrow and Company. It purported to be a more serious work investigating the links between organized crime, toxic waste dumpers and "naming the names" of those in government who "conspired with the mob to poison our air, land and water".

As my testimony will explain, I have had cause to wish two things over this past year. First, I suggest that it would have been better if Mr. Hughes had spent less time on a lighthearted work of fiction involving imaginary members of Congress and given more attention to this other of his books, Poisoning for Profit,

which presented itself as fact -- shocking fact requiring urgent attention if the public interest is to be protected -- but which in the course of its exposition unfortunately made the most fantastic, utterly false and defamatory statements about an actual member of Congress, myself, and a distinguised investigating Subcommittee on which I served. These libelous statements were later repudiated by the authors but -- and this is my second point -- it would have been better for both William Morrow and Company, and myself, had legislation such as H.R.2846 been in effect at the time.

The intention behind Poisoning for Profit was excellent; the subject an important one. However, this book, which should have been carefully, even scrupulously, put together given its explosive subject matter, turned out in significant parts to be slipshod fantasy, containing the most preposterous, unsupported falsehoods and calumnies. If malicious intent was not involved, as the authors and publisher have claimed, then the ineptitude and misfeasance of both were monumental and inexcusable. To have gone ahead with sales of the book after they were alerted to the book's profound falsehoods and defamatory character, was unconscionable.

William Morrow and Company went ahead with sales anyway and there is no indication I am aware of that Lawrence Hughes gave the matter so much as a passing glance. I believe Morrow behaved in this regrettable fashion at least partly because it is hard to admit error of such a colossal sort and to be faithful to the responsibilities as well as the opportunities which the First Amendment implies. But mostly, Mr. Chairman and Members

of the Committee, I believe Morrow went ahead because under the laws of libel public figures must meet an all but impossible standard of proof -- and they may meet that only after deciding to spend fantastic sums, on legal and other fees associated with filing suit, not to mention prodigious amounts of energy and time.

Morrow went ahead with the selling of a book which, frankly, in my judgment, is in bookstores today because they could get away with it. They chose to negotiate letters from the authors to me withdrawing the book's most defamatory statements pertaining to myself. But write off sunk costs and withdraw the book to honor truth and fairness? No. Accept the embarrassment of admitting a mistake and the cost of making the book accurate before it continues to be sold to the public? That they would not do.

It is a fact that the laws of libel as they exist today allowed the authors and Morrow the cynical option of leaving to their own devices those whose intentions, actions, and public records of probity were falsified in their publication. Moreover, despite the authors' acknowledgement to me of the erroneous nature of a key portion of the book's contents, and Morrow's commitment to me never to print these lies again, Morrow continues to sell this book in its uncorrected form.

As one reads Poisoning for Profit: Organized Crime and Toxic Waste in America it becomes apparent that the book, as in the requirement of a climax for a good work of fiction, would benefit if the story line could include villains not just in

the waste disposal industry, but also in government at all levels, including the federal. In December 1980, I had chaired the first major Congressional hearing, by the distinguished and highly respected Subcommittee on Oversight and Investigations of the then House Committee on Interstate and Foreign Commerce, into organized crime and toxic waste. After months of painstaking and mostly secret investigative work the committee subpoenaed crucial witnesses and the hearing produced the most far-reaching revelations and the most detailed hearing record of any on this subject before or since. It was reported that way by the broadcast and print media who covered it at the time, and those of us who worked on it were justifiably proud of a classic example of what a first rate investigating body -- thought by many over a period of years to be the best in the Congress -- can accomplish. (In fact, a good portion of Morrow's book is based on the material first brought to public light by the committee at this hearing!)

But never mind the facts, the authors of Morrow's Poisoning for Profit decided in what one can only imagine to have been some kind of seizure of story-telling fantasy, or prejudice, or juvenile civics class speculations gone haywire, that, because I was from New Jersey, I was involved in a cover-up. In reading what the authors chose to write, no conclusion can be drawn other than that the intent and effect of the statements as they appear is to paint the committee and its members in this hearing as protectors of organized crime and those in government who traffic with it.

There is no point in reviewing all of the specifics of this

case here. It serves, rather, as an illustration of why and how Representative Schumer's proposed legislation would be useful in simplifying and shortcutting the process of securing redress after such an excursion into defamation by authors and a publisher. Each of the parties to the dispute could present their evidence and a judgment would be made which respected everyone's rights both substantively and procedurally -- without endless legal hassling, negotiations bedevilled by inequality of resources between disputants, and the distractions of a law which virtually guarantees a maximum of legal gamesmanship or unsatisfactory negotiations or both.

I submit for the record, Mr. Chairman, with your approval, a copy of the offending chapters of Poisoning for Profit which relate to me, together with my letters and memorandum to the publisher correcting the facts, and the communications to the publisher of others who knew the facts.

After more than a year of effort by myself, my skilled attorney, and others who were outraged by the flagrant falsehoods concerning me in this book, and concerning the investigating subcommittee and its superbly professional staff, the authors sent me letters, negotiated by the publisher's attorneys, repudiating what the book described as to my role. The book stated that I conducted a "damage control" operation and "prevented" the hearing "from pursuing many of the most important issues." In their letters to me the authors completely reversed their position, indicating that I did not intend to do and did not do what the book said I did. William Morrow and Company also

promised never to reprint these falsehoods and they paid all of my legal expenses. I review this history briefly here, Mr. Chairman, because you asked me to tell the committee about my experience with the authors and publisher of Poisoning for Profit, and to appear before this committee to discuss my experience and suggestions for changes in current libel laws, which I gladly do.

A popular argument holds that under the First Amendment public officials are fair game for any comment, libelous or not. This may account for the legal fact that a public official's test of evidence for proving libel is hopelessly more difficult than that of any other member of the public. Moreover, it is widely believed, even by otherwise thoughtful commentators, that the danger of official intimidation of the media, or of a chilling effect accomplished by threat of the ability to inflict costs and focus embarrassing public attention on media statements (whether they are accurate or not) through suits brought by celebrated public figures -- a Westmoreland or a Sharon, say -- is the only major problem we are talking about when we address the complex issues involved in libel cases involving public officials.

Certainly this is a crucial problem, deserving of the most serious attention. No one in our society could accept corrupt but powerful public officials intimidating media because particular media organizations have less power and fewer resources than have the public figures whom they may wish to criticize. But what about the opposite situation where a powerful and wealthy media organization can with near impunity heap calumnies

and falsehoods upon a past or present public official who has neither the notoriety nor the power nor the resources to fight back effectively? That is in fact the situation in which I found myself after William Morrow and Company published Poisoning for Profit. Some new legal mechanism and procedure such as that proposed in H.R. 2846 would have been helpful in this as in other recent cases, and is surely needed.

Let's face it. There are abuses of the rights and privileges conferred by the First Amendment. As recent publishing and journalistic history has shown, the media is too often taken in by incompetent charlatans or practitioners of deliberate fabrication. Even a prestigious publishing house can become unbelievably sloppy about even the most important matters. When that happens, there should be a remedy which is not hopelessly out of reach for those who have been falsely accused.

I respect good investigative research and reporting. One of the reasons I entered politics was because I was inspired by good investigative reporting to look at what's wrong, to care about it, and to do something about it. I've done investigative writing of my own. My book, Toward 'Uhuru' in Tanzania made judgments about individual British colonial administrators and about African leaders in the independence movement. Whenever I had an important conclusion or judgment to make about someone's actions, or intentions, or their effects, I interviewed that person, often more than once so that what others said could be cross-checked. I consulted others in a position to have known the person's general character and reputation and the facts as

to that person's actions at the time and, of course, any written records or accounts, contemporary or subsequent. In my book facts were presented as facts, judgments as judgments, speculation as speculation. Sources were identified. Unfortunately, none of these statements can be made about William Morrow and Company's Poisoning for Profit in respect of the authors' treatment of me and of the subcommittee therein.

I was known in the Congress as someone who did his homework prior to a hearing, took a particular interest in the investigative side of our work -- especially those investigations in which we could expose wrongdoing or problems needing solutions in my own state, as I did repeatedly -- and worked hard with the investigating committees on which I served to develop the best possible information and place it on the public record so that Congress or other responsible parties would be prodded to take corrective actions. The hearing of the Oversight and Investigations Subcommittee on December 16, 1980 emphatically fit that mold. In fact, it was one of our best.

But authors Alan Block and Frank Scarpitti wrote a book, and the generally respectable Morrow publishing house put in print, that I was at the hearing in December 1980 to -- and did -- conduct a cover-up operation. But were there any facts or even procedures which the authors could adduce showing that this was competent investigative reporting?

The authors never interviewed me or spoke to me. Apparently, the publisher's lawyers reviewed the book to make sure it was worded so that it would be as difficult as the law allows for

public figures to successfully sue for libel, but neither Morrow nor the authors inquired of anyone as to my character or reputation or investigative record in Congress or throughout my career. Nor did they interview any other member of the investigating committee or the committee staff. They had not attended the hearing themselves -- they were not interested then in this subject -- and there is no indication that they ever talked to the investigative and news reporters who did cover the work of the subcommittee at that time.

One author did talk to a witness whose testimony and records were subpoenaed by the committee, a New Jersey State trooper who admits that he "speculated" or heard someone else "speculate" about my intentions at the hearing although he had no knowledge, no names of other speculators, "no fact whatsoever." He cannot understand why the publisher released the book and advised Morrow that the book was "based upon supposition and statements by the authors which are untrue, knowingly false and made with knowledge they are so." He asked Morrow to withdraw the book from publication when he learned of the falsehoods it contained. He also told the author at the time that his "speculation" went contrary to what he knew my reputation to be. A second witness remembered hearing the State trooper speculating. From this is woven a fabric of the most flagrantly outrageous falsehoods by authors who had no facts and no basis from which to defend the statements contained in the book pertaining to me and the subcommittee's December 16, 1980 hearing.

The hard truth is: there were no facts based on any credible

sources and speculations which were reported without justification as facts were false. There was no process -- by the authors or the publisher -- of checking these extreme and defamatory statements that were totally at variance with everything that could so easily have been known about me, the Subcommittee on Oversight and Investigations, our respective public records and, indeed, specifically about the hearing of December 16, 1980. The statements were placed, unchecked, uncorroborated, the naive speculation of one person presented as fact, in print and publicly in the marketplace, on bookshelves, and in libraries, with the result that my reputation and public career are tarred with the falsest imaginable statements exactly opposite to what I believed in, stood for, and worked for consistently all my life, including the hours that I spent preparing for and chairing the December 16, 1980 hearing. The Subcommittee and its staff, notwithstanding their excellence and Congressional immunity, are similarly defamed. These calumnies are available today to any person who reads Poisoning for Profit and cannot know that the book has been repudiated with respect to what it says about me and my role not only by those who know the facts, but also by those who wrote it.

Of course, there is always in any shortened account of reality -- even by painstakingly careful and reputable authors -- a risk that people will be portrayed unfairly or incompletely or in ways they would themselves prefer had been handled differently.

That is not what we're dealing with in Poisoning for Profit. This is instead a case in which the investigative methods used, the authors' devotion to truth, and the publisher's professionalism were so marred, so fundamentally flawed, so utterly deficient as to be non-existent or inoperative. The result was not a slight distortion, an incomplete truth, nor a matter of emphasis or selectivity. It was a monstrous lie. It had either to be willfully malicious, the product of unprincipled minds, or, as Michael Barrett, Jr., Chief Counsel and Staff Director of the Subcommittee, wrote the publisher on November 30, 1984 (almost three months before the book appeared for sale in stores), the result of "shoddy and irresponsible scholarship." I certainly don't know which, but is it unreasonable to suggest that the publisher should have checked and caught such vicious and obvious lies themselves and saved me the calumnies and them the embarrassments of their misfeasance?

My agony over this episode during the past year, and the meagre result I have achieved by threatening -- without much financial credibility, I'm afraid -- to file suit would largely have been avoided if a process such as that proposed in H.R.2846 had been in place. If it had been, both parties could have submitted their cases to a special form of judicial review as to whether a false and defamatory statement had in fact been made. Recourse to the current cumbersome, all but unworkable, and grossly unfair (especially to less monied parties) method in which fact, damage, and malice (i.e. intent) all must be shown before libel is proved in law, would have been unnecessary.

No public official in the position in which I found myself is looking for a financial award -- although in cases like this one tends to feel some such award would be amply justified. What we are looking for is a correction, publicly made and attested to in the appropriate places, after the determination has been made by a responsible ajudicatory process that false and defamatory statements have been made. We want our reputations restored; and we want the perpetrators of fraud in print -- whether by malice or incompetence or simple error -- brought to justice. Justice here means acknowledging and publishing corrections, and withdrawing defamatory materials.

I would add a couple of points that I would ask the committee to consider as it drafts revisions to H.R.2846.

First, the definition of an eligible plaintiff should be extended beyond a public official or figure to explicitly include former public officials who might, as I did, have a cuase of action arising out of an account of an earlier period during which they served.

Second, a declaratory judgment that a statement is false and defamatory should carry with it a requirement that the defendant withdraw any false materials not yet sold or broadcast and add an errata sheet or other obvious form of correction to those already sold which can be located (e.g., in libraries or wherever purchasers can be identified), or broadcast a retraction of those already broadcast. This is especially important if, as in subsection 1(d) of the current draft, the defendant may at his discretion convert an action brought against him from a suit for libel to

a declaratory judgment without the acquiescence of the plaintiff.

This added requirement need not be an undue burden, especially if the judge is given some discretion in defining exactly what the guilty defendant will be required to do. The argument for such a provision is obvious: those who are willing without even minimal cross-checking of authors or material to print or broadcast false and defamatory statements affecting someone's character or alleged actions (e.g., helping to cover-up for those involved with organized crime), ought to bear such a responsibility as integral to the exercise of the freedoms and opportunities the First Amendment rightly enshrines.

Nor, of course, is this prior restraint. It is an appropriate means of making minimal restitution for defamation after the fact. It would not be likely under a declaratory judgment to exceed the modest financial penalty of foregoing a portion of profit or "writing off" some of the costs of the item in question, so it should have no "chilling" effect. Unlike the situations one frequently encounters under current law, no intimidation one way or the other can be involved. Those less powerful and of modest financial means -- be they media organizations or public figures -- will the more readily enjoy the fruits of the First Amendment without the abuses and the distortions which are now all too apparent and derive from the unnecessary convolutions of current libel law as it relates to public figures.

In conclusion, Mr. Chairman, I must make one final point. The First Amendment is and must be sacrosanct. It is as close to an absolute as we have in our constitution and in the traditions

of the practice of democracy in our nation. I know this committee shares this view and would never seek to qualify in any way the protections of the First Amendment, as I would not. I do not believe that the causes of action for defamation proposed by H.R.2846, the procedures it lays out, or the refinements I have suggested go counter in any way to the provisions of the First Amendment or the protections it guarantees, but I am prepared to defer to the expert members of this committee and to authorities on constitutional law if there is any uncertainty about this.

There can be no qualification of the intent or the effects of First Amendment protections if we are to preserve our democratic system of government within a free society. If there is a balance to be struck between First Amendment protections and the convenience or even reputation of individual public figures who may be defamed in specific instances, as I have been, the balance unquestionably must lie with full protection of free expression.

Thank you, Mr. Chairman.

Submissions for the Record:

1. Barrett to Lister, Nov. 30, 1984
2. Maguire to Hughes, Jan. 14, 1985
3. Maguire to Hughes, Jan. 17, 1985
4. Maguire memorandum to Hughes, Jan. 17, 1985
5. Jaffee to Hughes, Jan. 22, 1985 (retyped for legibility)
6. Eckhardt to Hughes, Jan. 24, 1985
7. Gore to Hughes, Jan. 28, 1985
8. Dingell to Hughes, Jan. 28, 1985
9. New York Times article, Feb. 2, 1985
10. The Record article, Feb. 12, 1985
(11. Block to Maguire, Nov. 20, 1985)
(12. Scarpitti to Maguire, Nov. 20, 1985)
13. Arden to Maguire, Jan. 14, 1986
14. Maguire to Hughes, Feb. 18, 1986
15. Hughes to Maguire, Feb. 21, 1986
16. Maguire to Hughes (1), Feb. 24, 1986
17. Maguire to Hughes (2), Feb. 24, 1986
18. Poisoning for Profit, pp. 155-181

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

November 30, 1984

Ms. Laurin Lister
Senior Editor
William Morrow & Company,
Inc./Publishers
105 Madison Avenue
New York, New York 10016

Dear Ms. Lister:

Thank you for sending me the bound galley of Poisoning for Profit, a book which allegedly "scrutinizes the links between the Mafia, their corporate patrons, and government officials." You expressed hope that Chairman Dingell would offer an advance comment to be used on the jacket and/or on advertising for the book. Chairman Dingell asked me to respond. While I have not read the entire galley, I have become familiar with chapters 5 and 6 and welcome the opportunity to comment.

You describe Poisoning for Profit as an "investigative report." I am constrained to disagree strongly. An "investigative report," at minimum, must be founded upon facts which are presented in a fair and objective fashion. Chapters 5 and 6 contain a mixture of inaccuracies, half-truths, innuendo and unfounded speculation.

I do not intend at this time to go into a line-by-line discussion of the defects replete in these chapters. I will mention only several of the most egregiously inaccurate statements.

The authors' statements that "[t]he clear but unspoken function of the December hearing ... was to deflect criticism and deny a proper investigation"; that "those with something to conceal succeeded"; that "New Jersey's unfortunate success in controlling the Congressional hearing was most evident when the time came (and quickly went) for the Detectives Ottens and Penney to testify"; and, that Congressman Andrew Maguire "certainly prevented the hearing from pursuing many of the most important issues," are vicious charges unsupportable in fact. Through these statements, the authors have made an unwarranted attack on the motives and integrity of Members and staff of the Subcommittee.

I am not suggesting that the Subcommittee should be immune from criticism. In my opinion, however, an author of any fair and objective investigative report would have interviewed relevant persons before forming any judgment or drawing factual conclusions. No Member of the Subcommittee, including its then Chairman, Acting Chairman (December hearing), or most active member throughout the Subcommittee's hazardous waste investigation, was interviewed. Neither was any member of the Subcommittee's staff which, incidentally, involved the same staff that has conducted all of the Subcommittee's hazardous waste investigations during the 1979-1984 period.

I believe the failure to interview the principal parties evidences shoddy and irresponsible scholarship, at best, and the resulting product proves my point.

Sincerely,

Michael F. Barrett, Jr.
Chief Counsel and Staff Director

MB:MJRcm

cc: Professor Alan A. Block
Professor Frank R. Scarpitti

WORLD RESOURCES INSTITUTE
A CENTER FOR POLICY RESEARCH

1735 New York Avenue, N.W., Washington, D.C. 20006, Telephone: 202-638-6300

PERSONAL AND UNOFFICIAL

14 Jenuery 1985

Mr. Lewrence Hughes
President
Willism Morrow end Compeny, Inc.
105 Medison Avenue
New York, New York 10016

Deer Mr. Hughes:

I phoned your office todey. Unehle to reech you, I edvised your publisher, Sherry Arden, thet Poisoning for Profit, e copy of which I heve just seen in uncorrected hound gelleys, contsins in chepters 5 end 6 utterly felse stetements ebout the House Oversight end Investigetions Suhcommittee, its December 16, 1980 heering, end the ections of its members, including myself.

As I seid to her, I request thet Morrow hold distribution of the hook et its present point (in werehouses hut not yet in stores eccording to Ms. Arden) until you review e deteiled memorendum I em now prepering on the felse portions of the text.. This will he in your hends hy this Friday, Jenuery 18.

Pleese elso see the enclosed correspondence deted November 30, 1980 from the Chief Counsel end Steff Director of the subcommittee, on which the suhcommittee received no reply from Morrow.

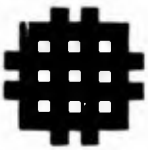
Ms. Arden edvised me thet I could expect to heve e response to my request tomorrow morning, Tuesday, Jenuery 15.

Sincerely,

Andrew Meguire
Vice President

Enclosures

AM:mkd



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PERSONAL AND UNOFFICIAL

January 17, 1985

Mr. Lawrence Hughes
President
William Morrow and Company, Inc.
105 Madison Avenue
New York, New York 10016

Dear Mr. Hughes:

In chapters 5 and 6 of Poisoning For Profit, the portrayal of the House Oversight and Investigations Subcommittee's December 1980 hearing, and of my role and that of the committee and its staff (see enclosed memorandum), occurs within the context of a book which advertises itself in the Foreword as one which "shall detail the ways in which these (organized crime) syndicates and their many helpers in business, politics, and law enforcement are poisoning all of us for profit." In a letter promoting the book to Committee Chairman John Dingell, it is described as "an investigative report about the infiltration of organized crime into the toxic waste disposal industry (which) would have been impossible but for the cooperation of both government officials and the generators of toxic waste themselves." The letter goes on to say that it will name the names of those "who have conspired with the mob to poison our air, land and water."

This is an important and worthy objective; indeed it was the committee's and mine in 1980. But the utterly false account in chapters 5 and 6 of the actions, intentions, and accomplishments of myself and the committee and its staff -- and of the investigations related to the December 16, 1980 hearing, its findings, and its results -- is not only the very opposite of truth; it can only be understood in the context of this book as a willful, malicious, vicious, and reckless attempt to falsify the record and rewrite history.

Make no mistake: the intent and effect of these heinous lies is to paint the committee and its members in this hearing as protectors of organized crime and those in government who traffic with it.

It is impossible for me to believe thet anyone -- including the authors, the editors, and the publisher -- really can or does believe, or believes they even heve resson to believe, that the book presents anything remotely approximating the facts with respect to these matters. It is especielly noteworthy and utterly astounding that no one who knows the fects about the committee's work was interviewed by the euthors.

The issues here go well beyond the legal ones. Perhaps a tissue of allegations and cleims and felsehoods end speculations (with bits of fact to lend credibility -- an eccurete quote of testimony, for example) has been pieced together by the authors and presented in such a way es to be ecceptable to your lawyers. But that is not fact. It is not the truth.

In Congress I didn't play games. I didn't make deals. I never engaged in "damage control". My cereer was based on a different set of principles: independence, openness, rigorous pursuit of the public interest. Ask anyone inside or outside the Congress who worked with me or knew me, whether they agreed with me on issues or not. Never would I protect or seek to preserve the reputation of anyone in government or elsewhere who was guilty of wrongdoing or of covering-up others' wrongdoing. Never ever. I spent six years in the Congress uncovering things, moving things forward, forcing ection in the public interest. That's my commitment, my record, my eccomplishment. I spent six years being impervious to pressure from whatever source. I led the Congress to embark on its first sucoessful Ethics Committee investigation of e Member beceuse I believe in exceptional stendards for public service and have ected on those unwaveringly -- including my work with the Oversight and Investigetions Subcommittee in ell its heerings, but most especielly that on December 16, 1980.

For anyone who oeres to look, my integrity and performance -- and thet of the committee -- are not hard to treck. The record is so clear to most observers -- critios and supporters and knowledgeable oommentators alike -- that this book's account should reise, <u>e priori</u>, the most disturbing questions in the mind of anyone who cares to check. That is before one even gets to the manifestly flewed construction of the materials and erguments in the book itself -- e construction of felsehoods which must be malicious beceuse it is so recklessly in disregerd of the fects.

I am harmed by this book with respect both to my past public service and my current position. As Ms. Arden indicated, the books are not yet in stores; my own checking with half a dozen major stores which plan to carry the book in New York and Washington today confirms that. This gives you an opportunity before you distribute the book to check the facts and make appropriate corrections, and I urge you to do so. I offer to meet with you, with my counsel and yours, at any place convenient for you beginning with your receipt of this letter. (My home number is (202) 546-9783; my office phone is on the letterhead.)

Sincerely,

Andrew Maguire
Vice President

AM/wsw

cc: Sherry Arden
Publisher
William Morrow and Company, Inc.
105 Madison Avenue
New York, New York 10016

Robert Callagy
Satterlee and Stephens
277 Park Avenue
New York, New York 10172

Renee Schwartz
Botein, Hays, Sklar, and Herzberg
200 Park Avenue
New York, New York 10166

MEMORANDUM TO: Lawrence Hughes
President
William Morrow and Company, Inc.

FROM: Andrew Maguire

DATE: January 17, 1985

GENERAL

Before commenting on the uncorrected bound galley page proofs of Poisoning For Profit, the facts in outline form are as follows:

For several years the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce (the subcommittee or O and I) had been engaged in investigations of toxic waste disposal and legislative and enforcement issues relating thereto. This pathbreaking work dealt in detail with Love Canal and other instances of improper or illegal disposal of hazardous materials; O and I was and has been widely regarded as the leading subcommittee on these issues in Congress and provided considerable impetus for, among other things, the Superfund bill and the Resource Conservation Recovery Act.

In 1980 O and I's work led us to undertake an examination of toxics problems in New Jersey, and, particularly, of the federal-state strike force, which was unique to New Jersey. We wanted to develop as much information as we could on toxic waste disposal in New Jersey, on the suspected role of organized crime in the illegal disposal of toxic waste, and on enforcement progress and problems. We wanted to see how well the strike force model was working, account for federal funds, and see what additional legislative and enforcement issues needed to be examined by federal or local authorities. We were staffed by a counsel and two investigators with 58 years of investigative experience between them; they were with the committee throughout the 1979-82 period of these investigations and remain with the committee today.

When we failed to get cooperation from the authorities in New Jersey with respect to voluntarily agreeing to allow Ottens and Penney to present information to the subcommittee, I and other members of the subcommittee voted to subpoena their testimony and all relevant documents. O and I investigators proceeded to New Jersey and subpoenaed the documents. Subsequently, Ottens and Penney were debriefed at length by majority and minority staff members of the subcommittee who compiled with the assistance

of the Ottens and Penney testimony a list of those cases where it appeared that strike force investigations were being mishandled. Ottens and Penney also made significant statements about the involvement of organized crime figures and families in toxic waste disposal in New Jersey.

Some days prior to the first scheduled public hearing on these matters, Harold Kaufman contacted the committee and furnished information on the involvement of organized crime. Kaufman, a federal protected witness who had been working undercover with federal authorities, was then involved in a variety of grand jury proceedings, some of which were in progress, or had resulted in indictments and were awaiting trial. The subcommittee (Eckhardt, Gore, and myself had shown the most interest) in consultation with the staff decided that it was important for our investigation -- particularly on the involvement of organized crime -- to get Kaufman on the witness stand. New Jersey's Director of Criminal Justice, Stier, said they had to withhold Kaufman because they felt premature public testimony would damage the grand jury proceedings and pending criminal cases in which Kaufman was a key witness. In a phone conversation from the O and I committee chairman's offices, in the presence of committee counsel, Mark Raabe, I told Attorney General Degnan that withholding Kaufman was unacceptable to the committee and that we were prepared to insist that he appear. When consulted, the Justice Department told O and I it would defer to the wishes of the New Jersey Attorney General's Office and its prosecutors. The subcommittee was unable to assure Kaufman's appearance absent an agreement that he would not be required to testify publicly on matters pending before grand juries or the courts lest the successful prosecution of those cases be jeopardized. The same request has been made by the Attorney General of the U.S. relating to testimony in pending criminal matters. It is not unusual and has been agreed to by the subcommittee and other Congressional committees on a number of occasions. With this agreement, the subcommittee received Kaufman's important and explicit testimony on the patterns and methods used by organized crime in their deepening involvement in toxics disposal and on the names of those who were involved, but without jeopardizing (which of course we had no desire to do) pending criminal cases.

The hearing lasted for well over 7 hours. We regarded it as a pathbreaking hearing and an excellent beginning to the committee's expanding and continuing investigation. For the first time on the public record, Kaufman, supported by Ottens and Penney, described how organized crime had moved from its past involvement in solid waste disposal into toxic waste disposal, using "property rights" allocations and enforcement through threats and acts of violence, including murder. Methods were described, names were named, and instances were discussed on

the record. The best cases of mishandled investigations from the strike force files and the Ottens and Penney interviews were prepared by the staff (without advice or assistance from any member) and placed on record. After Degnan and Stier were given copies, they were questioned at the hearing on the most troubling cases by members, including myself, and by the majority and minority counsels working from questions carefully prepared by our investigators from our best material. Their answers then, and later in writing, did not match the committee's views as to the proper handling of criminal toxics investigations. The case summaries we developed, the questions we asked, subsequent investigations by the committee, and the report it issued in 1982 after two years of work strongly reflect that fact, for anyone who wishes to look. (See June 9, 1981 hearing entitled: "Hazardous Waste Matters: A Case Study of Land Fill Sites" and O and I's December 1982 "Hazardous Waste Enforcement Report.")* But according to the professional investigators and staff counsels who reviewed and analyzed all the material in our possession, we had no information to get anywhere near proving that New Jersey officials were corrupt or had committed criminal offenses. If we had had such information, you may be certain that we would have laid it on the record or presented it to the Justice Department for investigation and prosecution.

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*The investigative leads derived from the December 16 hearing culminated in follow-up O and I hearings which examined many additional cases, resulted in further indictments and convictions, and prompted reorganization of the toxics section the Criminal Justice Division, including the transfer out of Deputy Attorney General Sakowicz who had been identified with the mismanagement and mishandling of investigations at the December hearing. These results and the 35 pages of oral testimony and questioning of Degnan, Stier, Winter, and Pagano (hearing record pp. 87-95; 125-49) on December 16 are not discussed by the authors. The New Jersey officials were questioned on the paucity of strike force indictments, on organized crime, and on the deficiencies of the operations of the strike force. I snd other members of the committee and staff counsels outlined cases of mishandled strike force investigations, required written responses from the New Jersey officials in addition to the oral responses given by them at the hearing, and the committee issued an extremely critical report -- none of which is discussed by the authors.

CHAPTER 5

Although other parts of the text are important in setting the context for chapters 5 and 6, (and some specific references elsewhere are important as well), I here address the key points in chapters 5 and 6.

pages 155-61. Here the authors discuss events that led up to the Subcommittee's December hearing. Let me highlight several points:

Was the Subcommittee being controlled when it refused to let a New Jersey watchdog sit in on its initial request to interview Detective Ottens? No.

Was the Subcommittee being controlled when it forcefully pressed ahead and took the unusual step of serving a subpoena on Ottens and Penney for their records and testimony, which I supported? No.

Was the Subcommittee being controlled when it excluded the State Police Major who had accompanied Ottens and Penney from the September executive session hearing and refused New Jersey officials' efforts to discover what Ottens and Penney had told the Committee? No.

Was the Subcommittee being controlled when it requested an independent General Accounting Office investigation of strike force expenditures? No.

Was the Subcommittee being controlled when it obtained Strike Force files and interviewed New Jersey investigators and prosecutors assigned to the Division of Criminal Justice? No.

Was the Subcommittee being controlled when its membership pressed forward with this important hearing in the waning days of the 96th Congress? No.

Was the Subcommittee being controlled when it insisted on a federally protected witness' appearance at the December hearing over the objection of the New Jersey Attorney General's Office? No.

pages 161-2. Since the answers to each of these questions show exactly the opposite of "control" of the Subcommittee, the authors concoct a bizarre scenario about me being a "damage control" agent at the December hearing.

Contrary to what the authors say, the facts are these:

1. With Eckhardt absent, I was not the ranking Democrat. There were four other Democrats who outranked me on the subcommittee, including Gore who attended the hearing. I chaired the hearing because Chairman Eckhardt phoned and asked me to. (Notice I said Eckhardt, not Stier or Degnan* or Byrne, or anyone else. The only time I spoke to Degnan or Stier about the committee's investigation before or since the hearing was when, on the phone together with committee counsel, I insisted that New Jersey produce Kaufman as a witness.)

2. It is false to state or claim that I ever stated that I was at the hearing to protect the reputation of the state of New Jersey and the Attorney General. What I did say publicly and privately was that it was essential to preserve the integrity of criminal grand jury proceedings and prosecutions so that cases being advanced by the New Jersey-federal strike force (for which I thought both New Jersey and federal authorities deserved some credit -- a point the authors agree to on p. 104, at least in principle) would not be jeopardized.

3. It is false, utterly false -- so false as to be the complete opposite of the truth -- to state, as do the authors, that "Maguire certainly prevented the hearing from pursuing many of the most important issues." We got every witness that we could get there; we asked every question that seemed to make sense to ask after months of exhaustive investigative work by the staff; we spent nearly 7 uninterrupted hours at it that day -- longer than any hearing I have ever attended. And the hearing was, in fact, a pathbreaking, explosive hearing that broke lots and lots of new ground on the issues which these authors say are the important ones: in fact, they cite the testimony that emerged at the hearing throughout the book.

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*Although it is not relevant to the hearing and the authors' discussion of it, I wish to comment on the political innuendos here. First, by way of background, I did not endorse Governor Byrne when he ran for reelection in 1977, and during his terms I had a record of support of or opposition to the Governor depending on the issue. I was always regarded as independent of the Governor. I endorsed Degnan for Governor in the spring of 1981 because I believed that he was an able Attorney General, was of the highest personal and public integrity and was the best of the candidates in terms of character and on the issues. At the end of 1980 and until well after I endorsed Degnan it was not clear to political insiders in New Jersey that Byrne thought Degnan had much of a chance or that he would endorse him. In fact, for awhile it was speculated that he might endorse another of the candidates.

This hearing was a breakthrough for the committee after months and years of work and provided the basis for ongoing investigations and further hearings a few months later. Read the record of the hearings and you will see.*

Another very important set of things to understand about why this statement is so totally false and could, with a little effort on your part, be proven to be so, deals with the continuity of committee and staff work and how the responsibilities for questioning are distributed among members and staff. The staff prepares for the hearing at the direction of and under the general supervision of the Chairman, in this case Eckhardt. Regardless of who physically sits in the chair at the hearing, committee members are briefed by staff prior to the hearing and are furnished documents and materials for use in questioning witnesses. Usually there are some understandings in advance about which members will lead questioning with which subjects or witnesses. The most promising questions and lines of inquiry are blocked out in advance by the staff and the members work from those, adding their own thoughts and interpolating questions as they go. The chairman often does not (as I did not in this case) lead questioning himself, but recognizes members in turn by seniority or by order of arrival. The minority counsel was given certain questions on the Kitt Enterprises case because of Rinaldo's interest in Elizabeth. Etc. At no time did I as acting chairman of the committee, either before or at the hearing, seek to prevent or rephrase any question that had been suggested by the staff, nor did I seek to constrain any member or staff person from pursuing any line of questioning. In fact, I did just the opposite, and the transcript shows it. There were no time limits as there sometimes are (e.g. five minutes each), people were asked if they wanted more time for questioning, and I pushed the questioning at key points in the hearing precisely on those organized crime matters which the authors say are important. The treatment of me and the committee here is not merely ignorant, utterly false, and totally astonishing -- it is also incomprehensible, vicious, and disgusting. To state and suggest what they state and suggest is preposterous and illustrates ignorance of how members and staff generally, and certainly this distinguished

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*Indeed Mr. Block himself has repeatedly cited the testimony and new information developed at the December 16 Oversight and Investigations hearing in his subsequent writings and Senate testimony in February 1983. Further, Mr. Block's Senate testimony contains no reference whatsoever that I or the Subcommittee generally were controlled by the State of New Jersey or attempted to deflect criticism or prevented the hearing from "pursuing many of the most important issues".

committee specifically, prepare for and conduct a hearing so as to get maximum coverage of issues.

4. "New Jersey officials told the subcommittee that most of the specific cases they might want to cover were currently before various grand juries and, therefore, couldn't be discussed." False on several counts.

First, this is not what they told us. What they did say is clearly in the record: that they would "indicate those areas that Mr. Kaufman might touch upon which would overlap with the details of some of the cases which are now pending in our state." (The authors got it right on p. 164, why not here?)

Second, in actual fact, we got fantastic testimony. Stier interposed himself on only two occasions (pp. 14 and 18) (and Kaufman restrained himself only twice (pp. 30-31) during the lengthy testimony and prolonged questioning of Kaufman (pp. 7-31). The statement that the committee was "certainly prevented. . . from pursuing many of the most important issues" is false and seen to be so as soon as one reads the actual testimony. New Jersey members were not the only ones who professed satisfaction with the hearing generally and the results of the carefully conceived strategy to get Kaufman to testify explicitly and in detail and for the first time in public on the names and places and methods of organized crime's involvement in toxic waste disposal in New Jersey. At the beginning of his testimony, I said on behalf of the entire committee: "it is our desire that this testimony, which we believe to be in the public interest, conflict in no way whatsoever with your efforts in obtaining criminal indictments and pursuing cases." After the Kaufman testimony, Gore said: "I would just like to mention for the record Mr. Kaufman contacted the subcommittee of his own accord, independently of the New Jersey officials, and we appreciate the 4 days of conversations we had with him before deciding to ask him to testify here today and the negotiations which were so fruitful and cooperative with the New Jersey officials." Gore also stated before Kaufman testified: "This other case in which you will be a witness is very important to us as well as to you, Mr. Stier, and you and I have talked about this, Mr. Kaufman, and if you get into that area, then both of us will try to be careful not to tread in that area." Was Gore, who receives consistent credits throughout the book, taken in by a New Jersey conspiracy? How about asking Gore what he thought of my chairing of this hearing and my work on the O and I committee that day and during the years we served together? Why not ask him if he was prevented by me or the subcommittee's pending criminal prosecutions agreement with New Jersey prosecutors with respect to Kaufman from "pursuing many of the most important issues"?

Third, although the author does not acknowledge it and implies the opposite by going on to talk about Ottens and Penney in the next sentence, the pending criminal prosecutions agreement with New Jersey officials did not apply to any testimony but Kaufman's. It did not apply to Ottens and Penney or any other witnesses, all of whom were free to talk about whatever they wished since they were not witnesses before grand juries or on cases awaiting prosecution. It is impossible that the authors could not know this if they read the testimony carefully or interviewed any member or staff person of the committee, which I am informed they did not. How can you write a book like this without talking to the relevant people?

5. I am told by staff who interviewed Ottens and Penney -- and I believe them -- that the last full sentence on this page is false. "Whether this is accurate or not", as your authors might put it, what I can say absolutely is that I gave no instructions to Ottens and Penney or any staff to advise them in any way whatsoever, including what the authors claim they were advised. (Although I am not mentioned in this sentence, this is a paragraph about my role, so it is relevant for me to make this point.) If the staff report to me is somehow not correct -- which I find inconceivable since over six years I learned I could rely on them -- and Ottens and Penney felt themselves to be under some constraint, it could only have been self-imposed or the result of conversations with someone other than members or subcommittee staff. In fact, contrary to what the authors are attempting to establish here, I asked the staff if there was any evidence of official corruption or criminal offenses by New Jersey officials arising out of the investigations: The answer was "no."

In fact, according to staff, Ottens and Penney were told that this was their opportunity to go public with whatever they wished. The officers indicated they did not want to get into a "one-on-one" with state authorities over stuff they could not prove. They preferred to talk about organized crime and its patterns of involvement, reinforcing the testimony we expected from Kaufman. Originally they were to have been the lead off witnesses and doubtless would have gotten more time to make the case in the absence of Kaufman. But that is very different from what the book falsely says. They were not told to discuss organized crime "only briefly". The revelations contained in their testimony are never discussed by the authors.

6. Interesting, tricky, final paragraph on pp. 161-62. The statement that "those with something to conceal succeeded" can't be proven or disproven in the absence of evidence, of which there is none. Not to mention the problem of who was trying to conceal what, which is not stated. Nevertheless,

"damage control" (to provide a transition to the next chapter title and a climax for the book at the federal level?) is described as being necessary here without any present particulars -- simply the factual statement that it was, which is absolutely false as regards myself and O and I. The statement follows the ridiculous preceding paragraph about me and is followed by the opening paragraph of Chapter 6 which starts with me; there can be no doubt that the authors are stating that I and the committee were engaged in "damage control" which "succeeded" with the result that the "full extent" of organized crime's involvement was "hidden" on December 16. Nothing could be further from the truth, as a look at the record will show. But look also at the paragraph, for it says the opposite of what it at first appears to say. With tortuous logic which no Philosophy I professor in college would ever accept, it argues that <u>because</u> "damage control" was "necessary", "much would nevertheless be revealed" and that what would come out would need "more and more scrutiny". Of course! That is the purpose of an investigative hearing. We succeeded, is what this says, in that purpose. We were not dragged into this hearing: we pushed for it, voted subpoenas for it, produced pathbreaking witnesses for it, spent 7 hours in public session going over every angle the staff or the members could think of. Perhaps some things were missed. I don't know. But when was there ever a hearing when that wasn't true? For any reasonable person, that cannot be a standard for corruption, as it is here. This was by all objective accounts a great hearing; we were excited and proud of what we had accomplished; and there is not an iota of an indication anywhere that I or the subcommittee could rightfully be accused of what we are accused of in these paragraphs. They could only have been written by someone with malicious intent, or appalling and unprofessional susceptibility to sources with malicious intent whose information was not -- because indeed it could not be -- confirmed. It can only be published "recklessly."

CHAPTER 6

page 163. Having on pp. 161-2 drawn the false conclusion that I and the committee were engaged in "damage control", this phrase now becomes the title and controlling image for Chapter Six. Sure enough, there I am gavelling the hearing to order. Indisputable fact! (Various members chair hearings all the time, by the way.)

After the correct quote ending with "taking the lead" I went on immediately to say: "But because it is a pilot program which could provide the pattern for others, it is appropriate and timely for this subcommittee to review its effectiveness and see what lessons can be learned." I then went on to point out that the federal mandate for the State receiving federal funds provided that the State "shall give special emphasis, where appropriate or feasible, to programs and projects dealing with the prevention, detection, and control ot organized crime."

"It was not really an all out effort". Entirely false. It was an unusually thorough and all-out effort. From January 1980 (not mid 1979 as the book claims, p.) committee investigators were seeking access to Ottens and Penney. Rebuffed by the State (which wanted Ottens and Penney to be accompanied to any conversations by a superior), the subcommittee expanded its inquiries and obtained a large volume of documents from Criminal Justice, DEP, and Ottens and Penney's own files and testimony. I voted for that subpoena on September 18, 1980, and investigators flew to New Jersey to take possession of the files that very afternoon. For weeks, investigators poured over the files (including I now know most if not all of the material which this book contains), interviewed Ottens and Penney for several days, and challenged state officials to respond on each point raised. The responses on every matter raised by Ottens and Penney were discussed by investigators with Ottens and Penney prior to their testimony at the December 16 hearing. They were invited to testify on any of the matters they had raised and, if they wished, to confront New Jersey authorities directly at the hearing; but Ottens and Penney said that on the basis of all the evidence available they would not confront the state officials on matters contained in Ottens' July 8, 1980 memo. At no time was I involved in nor did I intervene in these discussions or in this process. It was the most thorough imaginable process and was conducted by those who could have had no interest whatsoever in concealing anything. According to committee staff, Ottens and Penney concluded that beyond circumstances and associations and theories about screw-ups and delays they couldn't prove or even confidently allege corrupt acts from the data available to them, nor could the subcommittee. Continued subcommittee and public pressure on the state arising out of the December 16 hearing, its

investigations and data, however, resulted in successful State and federal prosecutions of a number of criminal actions and members of organized crime, including illegal disposal of toxics in Delaware -- the Capital Recovery case, on which the New Jersey officials were questioned by the committee (pp. 135-40 of hearing record) -- and at Lone Pine landfill in New Jersey. This hearing was enormously well put together, thoroughly researched, and every lead was followed up -- including committee criticism of the state when Ottens and Penney were reassigned and successful efforts to get the state to place a convicted felon (who had turned on the mob) in a federal facility where he could be protected. Indeed, what committee staff person or member would be stupid enough to try to conceal stuff about organized crime and/or corruption of public officials? If that were the objective, we certainly would not have pressed for the subpoenas and the investigations and the public hearing on December 16 which was covered extensively by the national media and which resulted in kudos and calls from all over the United States asking about information and assistance in getting information on organized crime in toxics in their areas. Could anyone believe for a moment that we would have put Ottens and Penney on the stand in a situation where they could have said whatever they wanted to say -- including that the committee had constrained them, if through some incredible stupidity or malfeasance it had? Utter nonsense on its very face. It is inconceivable that if our objective had been "damage control" we would have chosen to play it out over 7 and a half hours in this fishbowl on national television. To suggest that the committee did something different on December 16 than it did before or after is dead wrong and <u>wholly</u> contrary to the facts.

The straw man of "before new leadership could arrive on the scene" is introduced. Then we are told the committee hadn't had much time to gather evidence adequately. False. The committee had gathered an enormous amount of evidence and was continuing to do so and would continue to do so. There was total continuity here through fall 1980, winter, spring, and summer of 1981. The December 16 hearing did more than we had predicted that it could. It produced much more than would have been produced had we not forced Kaufman's appearance, subpoenaed Albert and Ottens and Penney, obtained state records, and confronted the State with its shortcomings and mishandling of cases. No other interpretation of this hearing was possible at the time nor by any knowledgeable person since. That it was so productive of continuing work was an evidence of its success! And that had been the objective in all of our minds. Ask someone who was there.

Again we have the utterly false statement on mid-164: "The subcommittee was controllable." False and inconceivable; a repetition of the misstatements corrected earlier.

Note omission in text of critically important word "not" at the line beginning "to matters not currently under investigation."

page 167. The first Duane Marine case had still to be tried following that grand jury indictment. Further amended indictments came from later grand juries.

There are lots of other places in the text of chapters 5 and 6, and elsewhere in the book, where I don't agree; but this memorandum covers the false material directly distressing to me.

(Retyped)

21 Rutgers Road
Clark, N.J. 07066
January 22, 1985

Mr. Lawrence Hughes
President
William Morrow Publishing Co.
105 Madison Avenue
New York, N.Y. 10016

Dear Mr. Hughes:

Last summer I was requested by your company to review a manuscript copy of Poisoning for Profit, for the purpose of writing a short jacket endorsement. Knowing Alan Block casually, I scanned the manuscript briefly. I must tell you that I did not read most of the text, due to more pressing matters and time constraints both on your company's end and my end. I then submitted to your company a favorable endorsement.

I have since had the opportunity to read the printed book in its entirety, and I am very annoyed with myself for having submitted the positive statement. I must honestly notify you that the lack of accuracy and truth in this book has left me appalled. The book has failed to take into account a great many material details which certainly would have been available to the authors and which would not have created the distortions that are characterized on many of its pages.

The book has numerous factual errors, some of which I view as quite serious, especially with respect to passages that relate to certain individuals. Some of these persons include former Congressman Andrew Maguire, former New Jersey Division of Criminal Justice Director Edwin H. Stier, and members and staff personnel of the House of Representatives Subcommittee on Oversight and Investigations.

I am, therefore, writing to you to formally repudiate my endorsement of Poisoning for Profit, and I am demanding that my name and endorsement be removed from any further printing and distribution of this book.

Sincerely,

Herb Jaffe

cc: Robert H. Callagy

21 Rutgers Road
Clark, N.J. 07066
January 22, 1985

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President
William Morrow Publishing Co.
105 Madison Avenue
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Sincerely,

Herb Jaffe

cc: Robert M. Callagy

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Of Counsel

* Md. Bar only

January 24, 1985

Robert Callagy, Esq.
Satterlee & Stephens
277 Park Avenue
New York, NY 10172

Dear Mr. Callagy:

Reference our telephone conversation of Friday, January 18, 1985, regarding Poisoning for Profit, a forthcoming book about the infiltration of organized crime into the toxic waste industry which is to be published by your client, William Morrow and Company, Inc.

As I stated to you, chapters 5 and 6 of this book contain an unwarranted and malicious attack on former Congreeman Andrew Maguire, the professional staff of the Subcommittee on Oversight and Investigations, and on the Subcommittee itself, which I chaired during the 96th Congress (1979-1980). Perhaps some background on the Subcommittee's pioneering work on the problems of hazaröous waste will provide you with an appreciation of the outrageous charges in the book.

When I took over the Subcommittee in early 1979, little attention had been given to the environmental problems associated with abandoned hazardous waste sites. Congress had passed the Resource Conservation and Recovery Act (RCRA) in 1976, a cradle to grave system for handling toxic wastes, however, the Environmental Protection Agency (EPA) had done little to implement the statute. There was an immediate need for oversight of this statute and for development of a statutory scheme to address the emerging problem of abandoned dump sites. In late October 1978, the Subcommittee held the first such hearing -- a hearing focusing in part on an environmental problem in Toone, Tennessee. The Subcommittee was chaired at that time by the very able Congressman from California, John E. Moss, who chose not to attend the hearing. Mr. Moss was leaving the Congress at the end of that term and he designated Congressman Gore of Tennessee to chair the hearing.

During the 1979-1980 period, under my chairmanship, the Subcommittee held twenty some hearings examining various problems associated with hazardous waste disposal. In connection with this wide-ranging investigation, testimony was received from representatives of the States of New York, New Jersey, Pennsylvania, Maryland, Texas, Michigan, Colorado, California and Kentucky. The Subcommittee analyzed the hazardous waste problems in those states and, in addition, investigated specific waste disposal problems in Tennessee, Montana, New Jersey, Idaho, Florida, and Louisiana. Testimony was also received from private citizens, waste generators, the General Accounting Office, the Environmental Protection Agency and the Department of Justice. Nearly a hundred witnesses appeared before the Subcommittee, contributing to a hearing transcript that exceeds 1,800 pages. Additionally, the staff interviewed dozens of persons and reviewed thousands of documents.

A significant portion of the Subcommittee's investigation was reflected in two Subcommittee reports: (1) Hazardous Waste Disposal (96-IFC-31); and (2) Waste Disposal Site Survey (96-IFC-33). The latter report identified 3,386 disposal sites used by domestic chemical companies since 1950. Approximately 2,000 of these sites were heretofore unknown to the EPA. These reports, and the recommendations contained therein, formed the primary impetus and basis for the passage of the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980 (Superfund) in the fall of 1980. Thus, the Subcommittee's primary investigative effort was successful in prompting a legislative solution to this serious problem. Moreover, we were successful in moving the EPA to accelerate implementation of RCRA.

Specific and substantive information about the modus operandi of organized crime involving toxic waste first came to the Subcommittee's attention in late 1980. Harold Kaufman, an FBI informant under the Federal Witness Protection Program, contacted the Subcommittee on December 9th regarding its hearing focusing on the Federal-State toxic waste Strike Force in New Jersey scheduled for December 16th. In a series of conversations with the Subcommittee staff, Mr. Kauman detailed how organized crime, through its control of the garbage industry and the haulers, extended its influence into the lucrative business of gathering, storing, and dumping toxic waste illegally.

When the staff reported to me on this development, I immediately requested the Subcommittee to vote a subpoena calling for the testimony of Mr. Kaufman at our December 16 hearing. There was little time because in less than a month, I

would be leaving Congress. The Subcommittee met and voted, without dissent, to subpoena Mr. Kaufman.

Unfortunately, voting the subpoena did not give us access to Mr. Kaufman. He was in Federal custody at an unknown location and, even if we had known where, we had no way to reach him. Since Mr. Kaufman was in Federal custody, I contacted the U.S. Department of Justice seeking his release for testimony. The Deputy Attorney General and the Assistant Attorney for Legislative Affairs thereupon came to the Subcommittee office where the Subcommittee's Staff Director and I met with them. They refused to provide Mr. Kaufman for the stated reason that he was a key witness for the State of New Jersey in its garbage cases.

At this point, several days of negotiations ensued with officials of the State of New Jersey. We were assisted by Congressman Maguire, after I asked him to chair the hearing. Ultimately, the New Jersey officials agreed to provide Mr. Kaufman on the assurance the we would not go into detail about cases pending indictment and trial. You should know that this is not an unusual agreement; generally, it would be irresponsible to require public testimony under such circumstances. You should also know that of the witnesses who testified at the December 1980 hearing, the agreement related only to Mr. Kaufman's testimony.

Following Mr. Kaufman's testimony at the December hearing, he continued to provide the Subcommittee with detailed information about organized crime influence in the solid and toxic waste industries. Mr. Kaufman provided additional sworn public testimony at a Subcommittee hearing the following May.

With this background, I call attention to certain highly objectionable and absolutely false passages in the book.

* * *

> "Efforts at damage control did not end with the unsuccessful inquisition of Ottens and Penny. There was one other angle left to play. Among the members of the Subcommittee was the lameduck Congressman Andrew Maguire, of New Jersey. With Chairman Eckhardt not in attendance, Maguire was the ranking Democrat on the Subcommittee. It apparently wasn't very difficult to convince Maguire to stick around Washington that December and chair the hearing. There wasn't much pretense involved in the maneuver. Maguire stated, it has been claimed, that he was there to protect the reputation of both the state of New Jersey and the Attorney General...Maguire certainly prevented the hearing from pursuing many of the most important issues." (p. 161)

You should know that when I realized I could not attend the December 16 hearing, I contacted Mr. Maguire and asked whether he would be availale to chair the hearing in my absence. (Mr. Gore, not Mr. Maguire, was the ranking Democrat on the Subcommittee, however, Mr. Gore was to lead the questioning.) Mr. Maguire agreed to chair. There was no maneuvering by Mr. Maguire. Indeed, I had no discussions with Mr. Maguire concerning this hearing until I requested him to chair. It was no surprise that Mr. Maguire agreed to chair because he, together with Mr. Gore, had been the most active Members of the Subcommittee throughout the 96th Congress. Mr. Maguire chaired the December 1980 hearing for me just as Mr. Gore had chaired the November 1978 hearing for Chairman Moss. Mr. Maguire conducted the hearing in a fair, proper and competent manner.

* * *

> "At this particular point [December 1980], though, before new leadership could arrive on the scene, and before it had much time to gather evidence adequately, the Subcommittee was also controllable. The clear but unspoken function of the December hearing concerning New Jersey's offical efforts against the toxic waste dumpers, therefore, was to deflect criticism and deny a proper investigation. This was damage control at work." (p. 164)

You should know that under my Chairmanship, the Subcommittee was not controlled by any outside forces, including the State of New Jersey, and it is a defamation of such flagrant and false character to imply that the Committee was engaged in "damaging control" to cover up organized crime as to evidence malice or total and callous indifference to whether or not a malicious misrepresentation was published - so long as it would sell more books.

The Subcommittee aggressively and thoroughly pursued every lead in its toxic waste investigation without regard to the persons involved, political considerations or the potential for criticism. Much of this work was done through a highly professional staff.

You should know that the three persons on my Subcommittee staff who investigated the operation of the Federal-State task force in New Jersey and the involvement of organized crime in toxic waste disposal are the same three persons who continued this investigation in the succeeding Congress. Moreover, these same three persons conducted the highly successful Subcommittee investigation in 1982 and 1983 which disclosed the EPA scandal. (Two of these persons have been investigating toxic

waste problems since 1979 when I took over the Subcommittee.) To state, as the authors did, that these persons were controlled by sinister forces is outrageous.

Committee action is that of a whole team of persons, including such professionals, and to say that the Subcommittee was controllably is to defame that entire team. Highly professional investigators who arrange a hearing may not be defamed with impunity, as is sometimes the case with elective public figures, like Congressmen.

In this particular case, the attack is particularly unjust and injurious because of the investigators' unusually high qualifications. The three staffers who organized the hearing have a combined investigative and prosecutorial experience of 58 years. Two of them have combined FBI investigative experience of 25 years and have worked under four chairmen of the Subcommittee. The other has worked under three chairmen. The authors have implied that these highly professional staff members conived in an "unspoken function of the December hearing" to prevent "the hearing from pursuing many of the most important issues." It is common knowledge that professional staff organize the hearing agenda of a committee or subcommittee. Integrity is the hall-mark of a good staffer. When that is attacked, it is a very serious defamation. I believe this book calls into serious question the integrity of these staff persons and does so in a particularly vicious manner without any justification whatsoever and that this is an actionable offense far different from the give-and-take between politicians or between public figures and the press.

To further underscore the negligent disregard of truth in the assertions in chapters 5 and 6 of this book, I bring to your attention the inexcusable and unfathomable fact that the authors did not contact me, Mr. Maguire, Mr. Gore, or any member of the Subcommittee, or the Subcommittee staff, before launching on the malicious attack in these chapters. There were no attempts to interview any of us and no interest to learn how it came about that Mr. Maguire chaired the hearing or why certain subjects were addressed in the manner they were. Had that been the investigative standard of staffers of mine, I would have fired them forthwith.

Sincerely,

Robert C. Eckhardt

RCE/cpm

Albert Gore, Jr.
Tennessee

825A Hart Senate Office Bldg.
Phone: 202-224-4944

United States Senate
WASHINGTON, DC 20510

January 28, 1985

Mr. Lawrence Hughes, President
William Morrow Publishing Co., Inc.
105 Madison Ave.
New York, NY 10016

Dear Mr. Hughes:

I have just recently become aware of a forthcoming book entitled, Poisoning for Profit, which is to be published by William Morrow and Company, Inc. Chapters V and VI of this book contain statements concerning the events surrounding a December 16, 1980 hearing of the Subcommittee on Oversight and Investigations into the involvement of organized crime in the hazardous waste disposal industry. In particular the book focuses on the questioning by former Congressman Andrew Maguire and myself and raises questions about the integrity of the Subcommittee staff. This book contains statements that are not only unfair, but grossly inaccurate. Although the book does not directly criticize my efforts in the investigation it does imply that I was under constraints in the kinds of questions I asked. This is simply not true.

I was never "hampered by the subcommittee's ground rules protecting New Jersey." In fact, the report which followed from the hearing severely criticized the New Jersey strike force in painstaking detail; however the authors apparently chose to ignore this fact.

Had the authors taken the time to interview me I would have had the opportunity to explain how wrong their impressions were of this critical investigation. Not only did they not talk with me, but I am told they never interviewed Mr. Maguire, Mr. Eckhardt, Mr. Dingell or the subcommittee staff. This would seem to represent a lack of professionalism.

Any student of the oversight process knows that this Subcommittee is the most highly respected investigative body in Congress and has never taken and will never take steps to "deny a proper investigation." The December 16 hearing was a highly successful chapter in the Subcommittee's investigation of the involvement of organized crime in the toxic waste disposal industry. I am proud to have played an active role in this investigation and regret the inaccuracies in this book.

Sincerely,

Albert Gore, Jr.
U.S. Senator

Congress of the United States
House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, D.C. 20515

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

January 28, 1985

Mr. Lawrence Hughes
President
William Morrow Publishing
Company, Inc.
105 Madison Avenue
New York, New York 10016

Dear Mr. Hughes:

On November 30, 1984, Mr. Michael F. Barrett, Jr., responded on my behalf to your company's request that I provide comment to be used in promoting the book, Poisoning for Profit. Your company has not responded to Mr. Barrett's letter, which pointed out a number of seriously inaccurate statements in the book. It is my understanding that the book is now scheduled for public release in the near future.

The charge that former Congressman Andrew Maguire and the Subcommittee, under Bob Eckhardt's chairmanship, engaged in damage control for the benefit of organized crime and of the Federal-State task force in New Jersey is preposterous. Furthermore, for this to have happened, the highly respected professional staff of the Subcommittee would have had to knuckle under to these same forces. This simply did not occur -- either wittingly or unwittingly.

It is important for you to understand that the three professional staff members who conducted the investigation for Chairman Eckhardt in the 96th Congress and staffed the hearing of December 16, 1980, were the same staff members who continued the investigation under my chairmanship in the 97th Congress. My Subcommittee was able to complete its very successful investigation in a timely fashion, and with a hard-hitting report (something the authors ignored), because of the solid foundation that had been laid by the Eckhardt Subcommittee.

I am submitting these comments in support of Mr. Barrett's letter and do so without waiving any privileges pertaining to the Subcommittee.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

cc: Robert Callagy, Esquire
Satterlee & Stephens
277 Park Avenue
New York, New York

NYT, 2/10/85

Charges in Book on Toxic Waste Called False

By RALPH BLUMENTHAL

An assertion in a new book that a former New Jersey Congressman sought to protect state officials by preventing a House hearing from pursuing issues of toxic-waste dumping has set off a flurry of protests.

The contention, offered with little explanation or documentation, is challenged by the former Congressman, Andrew Maguire, and by other members of the panel that held the hearing.

They dismiss the account by the authors, two professors from the University of Delaware, as false, and say they were never interviewed by them.

The House panel, the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, has been responsible for many revelations of involvement by organized crime in the illegal dumping of chemicals.

Endorsement Repudiated

The book, "Poisoning for Profit, the Mafia and Toxic Waste in America," by Alan A. Block and Frank R. Scarpitti, was recently shipped to stores.

Last week, the nation's largest waste disposal company, Waste Management Inc., filed a $60 million libel suit in Federal District Court in Manhattan, challenging assertions in the book that the company has links to organized crime.

And a journalist who praised the book in a cover blurb has repudiated his endorsement, calling the book distorted and inaccurate.

Factual errors have also come to light. The book, for example, says that an accountant for a major waste-disposal company is the brother of William J. Casey, director of the Central Intelligence Agency. But a spokesman for Mr. Casey said that he had only one brother and that he is dead.

Complaints to Be Reviewed

Robert M. Callagy, a lawyer for the publisher, William Morrow and Company, said Friday that the complaints were being reviewed.

Mr. Block, an associate professor of criminal justice at the University of Delaware, has been research director of the New York State Senate Select Committee on Crime since 1981. Mr. Scarpitti is a professor of sociology and a former president of the American Society of Criminology.

Mr. Block, in a brief telephone interview, said he and Mr. Scarpitti stood behind the book. The counsel of the New York Senate crime committee, Jeremiah B. McKenna — to whom the book is dedicated — said he regarded the authors' statements as valid.

The disputed assertions involve a hearing by the House subcommittee on Dec. 16, 1980, that examined whether New Jersey authorities had adequately addressed the illegal dumping of chemicals by organized crime.

No Source Cited

Mr. Maguire, a Democrat who was leaving Congress, was chairman of the hearing. The authors contend that Mr. Maguire stated that he was there to protect the reputations of New Jersey officials, including the Attorney General at the time, John J. Degnan, who was a potential candidate for Governor.

Mr. Block and Mr. Scarpitti do not cite a source for the contention.

"Whether that is accurate or not," the book goes on, "Maguire certainly prevented the hearing from pursuing many of the most important issues." It says that examination of some of the key witnesses was curtailed, showing that the subcommittee was "controllable."

The book asserts that "the clear but unspoken function" of the hearing "was to deflect criticism and deny a proper investigation" into New Jersey's anti-dumping efforts, and it called this "damage control at work."

Mr. Maguire, in a Jan. 17 letter and a 12-page memorandum to Lawrence Hughes, the president of Morrow, denounced the account as "utterly false" and "a willful, malicious, vicious and reckless attempt to falsify the record and rewrite history."

He said that he and the panel had fought unstintingly to uncover dumping abuses in New Jersey and that he had never stated that he was at the hearing to protect the state or its officials.

Rather, Mr. Maguire said, he had stated it was essential to protect the integrity of grand-jury proceedings and pending prosecutions. He complained that neither he nor other members of the subcommittee had been interviewed by the authors.

Representative John D. Dingell, a Michigan Democrat who assumed the chairmanship of the subcommittee in 1981, also wrote to Mr. Hughes last month, calling statements in the book "seriously inaccurate" and "preposterous."

Herb Jaffe, a reporter for The Newark Star-Ledger who uncovered some of the organized-crime dumping later investigated by the subcommittee, provided a jacket endorsement praising the book.

But he wrote Mr. Hughes that he had only skimmed the manuscript and now was appalled by "numerous factual errors" and "distortions" and wished to formally repudiate his endorsement.

Publisher to check facts in book that accuses Maguire

The Record, Hackensack, N.J., 2/12/85

By Roger Cohen
Staff Writer

A New York publishing house says it is investigating whether a new book on organized crime's involvement in toxic-waste dumping has falsely accused former Rep. Andrew Maguire of trying to impede a 1980 House inquiry to protect New Jersey officials.

Maguire, a Ridgewood Democrat who served three terms, says that he was never interviewed by the authors and that their allegations about him are "utterly false."

Former Attorney-General John J. Degnan, who the book says was the leading state official Maguire sought to protect, called the book "political bogwash" and "a scurrilous outrage, drawing the most remote inferences from the most tenuous fact."

The book, "Poisoning for Profit: The Mafia and Toxic Waste in America," is scheduled for release later this month by William Morrow and Company. It was written by Alan A. Block and Frank R. Scarpitti, professors of criminal justice and sociology, respectively, at the University of Delaware.

John Degnan

Last week, Waste Management Inc., an Illinois-based firm described as the country's largest waste-disposal company, filed a libel suit in U.S. District Court in Manhattan, charging that the book falsely links the company with organized crime.

Morrow yesterday issued a statement declaring that Block and Scarpitti are "reputable authors with impeccable academic credentials and previous publications to their credit."

The publisher's statement continued:

"At the time of publication, Morrow believed everything in the book was true and had no reason to suspect that anything in the work was inaccurate or unfair. Although Morrow's position in this matter remains the same, it is presently investigating certain inquiries objecting to statements in the book."

Scarpitti said he and Block "stand behind every word we wrote," adding that he could not elaborate because of the pending and possible litigation. "I assure you we have an answer for Mr. Maguire."

The disputed allegations about Maguire concern a Dec. 16, 1980, hearing of the oversight and investigations subcommittee of the House Energy and Commerce Committee, which has investigated and publicized broad organized-crime involvement in illegal chemical dumping.

Maguire, then a lame-duck member, presided at the hearing, and, according to an unattributed source in the book, stated that his role was to protect the reputation of the state and that of Degnan, who was at that time preparing an unsuccessful run for the 1981 Democratic nomination for governor.

The book says Maguire sought to deflect the panel's inquiry away from the state's handling of its criminal investigations of toxic-waste disposal.

Andrew Maguire

Maguire, who ran unsuccessfully for the 1982 Democratic nomination for U.S. Senate, is now the vice-president for policy of the World Resources Institute, a Washington environmental-study group. He was in Europe and could not be reached yesterday, but his office released a prepared statement in which Maguire said the publishers were informed that book's allegations "are, in fact, the very opposite of the truth."

"Inexplicably, neither the authors nor publisher ever contacted myself ... or anyone else in a position to know the facts," Maguire said.

The subcommittee subsequently issued a critical report about the administrative handling of New Jersey's efforts against dumping. Degnan responded at that time that the panel was "predisposed" to find fault with the state's efforts.

Now practicing law in Morristown, the former attorney-general spoke of Maguire's image of incorruptibility. "Anyone who knows Andy Maguire knows that it's not in his nature to cover for anyone," Degnan said, "and it's not in mine to have asked him."

Scarpitti said he and Block were not familiar with Maguire's reputation when they researched the book. He added that, although Maguire was not interviewed, "we looked at a great deal of data and talked to a large number of people."

The author said he and his partner "interpreted" the meaning of Maguire's actions at the hearing.

DR. ALAN A. BLOCK AND DR. FRANK R. SCARPITTI

November 20, 1985

Dear Mr. Maguire:

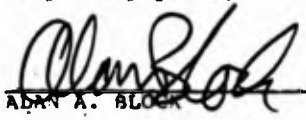
We are the authors of "Poisoning for Profit", which was published in hardcover by William Morrow & Company, Inc. in January, 1985. Included within the book are certain references to you in your capacity as acting chairman of the House of Representatives Subcommittee on Oversight and Investigations during hearings into toxic waste disposal. You have informed us that certain references to you which appear in the book are inaccurate and misleading. This letter is intended to respond to your concerns.

When we wrote the book we did not intend to imply that you were in any way dishonest, and we would be dismayed if any misunderstanding may have occurred in this regard.

When we wrote the book, we believed we were accurate in concluding that the Subcommittee, and you as acting chairman of the Subcommittee, conducted a Subcommittee hearing in a manner which resulted in the avoidance of areas of inquiry which we felt should have been given priority. The conclusions which we reached regarding the Subcommittee and your role represented our opinion based on the sources which we drew upon in connection with our writing of the book. Now, based on the additional evidence submitted by you, we recognize that you did not intend to participate in any activities which would have limited the ability of the Subcommittee to proceed appropriately; that you were not engaged in "damage control" and that you did not "prevent" the hearing "from pursuing many of the most important issues."

We are sorry for any inconvenience which our book may have caused you. Changes consistent with this letter will be made in any future printing, publication, film or media treatment of material from the book pertaining to your role. Should you be questioned regarding the mention of your name in our book, you are free to disclose this letter and the contents, but otherwise we have an understanding that you will maintain the letter in confidence.

Very truly yours,



ALAN A. BLOCK

FRANK R. SCARPITTI

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Very truly yours,

ALAN A. BLOCK

Frank R. Scarpitti

FRANK R. SCARPITTI

WILLIAM MORROW & COMPANY, INC.
105 MADISON AVENUE, NEW YORK, NY 10016
(212) 889-3050

SHERRY W. ARDEN
President and Publisher

January 14, 1986

Mr. Andrew Maguire
c/o Renee Schwartz, Esq.
Botien, Haya & Sklar
200 Park Avenue
New York, NY 10166

RE: POISONING FOR PROFIT: The Mafia and Toxic Waste in America
by Alan R. Block and Frank R. Scarpitti

Dear Mr. Maguire:

We understand that the authors of the above work, in a letter dated November 20, 1985, have agreed to make certain changes in any subsequent printing of the above work.

This letter is merely to confirm that Morrow will incorporate those changes as set forth in that letter.

Very truly yours,

Sherry W. Arden

cc: Robert M. Callagy, Esq.
Robert J. Hawley, Esq.
Richard Sugarman, Esq.

WORLD RESOURCES INSTITUTE
A CENTER FOR POLICY RESEARCH

1735 New York Avenue, N.W., Washington, D.C. 20006, Telephone: 202-638-6300

PERSONAL AND UNOFFICIAL

February 18, 1986

Mr. Lawrence Hughes
President
William Morrow and Company, Inc.
105 Madison Avenue
New York, New York 10016

Dear Mr. Hughes:

I enclose by expresss mail a draft of testimony I have been asked to present to the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, on February 26, 1986, at a hearing to review proposals for revisions in libel law as it pertains to public officials and public figures.

If I receive written comments from you by 5:00 P.M., Friday, February 21, I may be able to consider them in revising the draft over the weekend. If I receive your written comments (not those of Ms. Arden, another subordinate, or your attorney) by 5:00 P.M., Tuesday, February 25, I will be pleased to submit them along with my own statement to the Subcommittee for inclusion in the record.

Sincerely yours,

Andrew Maguire

AM/jmf

Enclosure

THE HEARST TRADE BOOK GROUP
105 Madison Avenue, New York, N.Y. 10016

LAWRENCE HUGHES
President

Tel 212•889•3050
Telex 22-4063 Wilmor

February 21, 1986

Hon. Andrew Maguire
World Resources Instituta
1735 New York Avenue, NW
Wsshington, DC 20006

Dear Mr. Maguira:

Thank you for your courtesy in allowing me to review the draft of the testimony which you intend to present to the Subcommittae on Civil and Constitutionsl Rights, Committee on tha Judiciary, U.S. House of Representatives, on February 26, 1986.

I disagree with tha disragard of First Amendment rights which you advocata, but I will not, in this short letter, sttempt to dissuade you of your opinions concerning how bast to deal with tha protections of the First Amendment. However, I must object strongly to the numerous incorrect and misleading factual statements contsined in your draft testimony, snd I do hope thst you will ractify them before it is delivered. The most agregious errors are ss follows:

First, William Morrow & Company has never repudisted its rola in the publication of POISONING FOR PROFIT for you or anyone alsa and is in no way ashamed of that book or of the statements it contains. Contrary to your testimony, William Morrow wss not a signstory to any latter to you or any other party repudisting ststaments contained in the book or apologizing for William Morrow's role in its publicstion.

Second, Dr. Alan Block and Dr. Frank Scsrpitti, the authors of the book, hava not rapudisted the ststements they made in POISONING FOR PROFIT. As you well know, tha letters you received from Drs. Block and Scarpitti ware the rasult of months of nagotiation. These lettars clearly stata that the authors of POISONING FOR PROFIT balieved st the time the book wss published that all of the statements made about you were true and accurste; thay presented their opinion of your rola on the Subcommittee on Oversight snd Invastigations bssed on sources which they ressonably believed to be reliable. Bssed on evidence presented by you, they indicsted thst they would, in the future, chsrscteriza your actions on the Committee somewhat differently. Drs. Block snd Scarpitti clearly did not "completely revarse their positions," as you suggest in your testimony.

Third, you incorractly stste thst POISONING FOR PROFIT was "rejected by another publisher." In fsct, on the strangth of the suthors' raputstion as accomplished resesrchers and writers, I understand that POISONING FOR PROFIT was accepted for publicstion by the only other publisher to whom it was submitted.

Fourth, William Morrow did not "falaely and improperly harm othera" when it published POISONING FOR PROFIT, nor haa it ever "admitted" that it has harmed others in publiahing the book.

Finally, the suggestion in your testimony that William Morrow treated the publication of POISONING FOR PROFIT in a cavalier fashion and diatributed it even though it had prior knowledge of alleged inaccuraciea could not be further from the truth. POISONING FOR PROFIT was written by two distinguished professors whose previous booka had received numerous accolades. The book was edited under the guidance of Morrow's experienced staff. Your suggeation that the book was produced without the appropriate degree of care because I peraonally did not edit it is a miarepresentation and misunderstanding of the publishing and editing process. William Morrow believes that POISONING FOR PROFIT contains important information for every American concerned about the environment.

I disagree with many more of the atatements contained in your propoaed testimony, but I hope that you will at leaat correct the factual errors that I have pointed out.

Sincerely,

Lawrence Hughes

LH/rp

WORLD RESOURCES INSTITUTE
A CENTER FOR POLICY RESEARCH

1735 New York Avenue, N.W., Washington, D.C. 20006, Telephone: 202-638-6300

February 24, 1986

Mr. Lawrence Hughes
President
William Morrow and Company, Inc.
105 Madison Avenue
New York, New York 10016

Dear Mr. Hughes:

Enclosed by express mail is a final text of the testimony I will present to the House Subcommittee on Civil and Constitutional Rights on February 26.

Mr. Robert Callagy, your attorney, phoned my former attorney, Renee Schwartz, to express several concerns about some of the wording of the draft testimony I sent to you (and only you) last week. She passed those concerns on to me.

First, although I had understood otherwise, Mr. Callagy's assurance that no other negotiations pertaining to this book have been completed has led me to omit any reference to others.

Second, since Mr. Callagy continues to argue that the book was "published" at some unspecified date prior to Morrow receiving notice as to the false and defamatory material it contained (this despite Michael Barrett's letter of November 30, 1984; Sherry Arden's statement to me on January 14, 1985, that the book had not yet been placed in bookstores; and the publication date of February 22, 1985, as announced in Publishers Weekly), I have reworded sentences to say that Morrow had this information about the book prior to sales of the book. (While I make these changes in this testimony, please understand that I do not by this acknowledge that the book was "published" and/or "distributed" prior to Morrow's receipt of notice as to its errors, especially since no dates for these occurences have been provided by you or your attorney.)

Third, Mr. Callagy asked that the authors' letter to me be quoted in its entirety or not at all. I have therefore omitted direct quotes, but if asked I will provide the full text of the letter to the subcommittee which has requested testimony as to my experiences with causes of action under existing or proposed libel law, and specifically my experiences with Morrow and the authors of Poisoning for Profit arising out of statements in the book describing my role at a December 16, 1980 hearing of a congressional subcommittee on which I served. The letter

itself gives me the right to disclose the letter if I am so questioned -- a right which I believe I may in any case exercise in response to the subcommittee's invitation to testify on these matters.

Fourth, Mr. Callagy requested that reference not be made to Morrow paying my legal fees, since you have not offered this to others with whom you are negotiating. It is a fact that you paid my legal fees and I feel entirely free to state that fact.

Finally, you will see that, throughout, I have in the revised and final version made a clear distinction between authors and publisher.

You should know that I am interested only in making the most factually accurate statement possible on February 26, and in placing my suggestions for revisions of the law before the subcommittee.

Sincerely yours,

Andrew Maguire

AM/jmf

Enclosure

WORLD RESOURCES INSTITUTE
A CENTER FOR POLICY RESEARCH

1735 New York Avenue, N.W., Washington, D.C. 20006, Telephone: 202-638-6300

February 24, 1986

Mr. Lawrence Hughes
President
The Hearst Trade Book Group
105 Madison Avenue
New York, New York 10016

Dear Mr. Hughes:

After I completed the accompanying letter to you, yours dated February 21 arrived.

Let me take the points you make in order.

In your remarks on the First Amendment, you have disregarded the final two paragraphs of my statement which clearly indicate my regard for the First Amendment to the point of saying that the proposed legislation and my proposals should be set aside if there is any question as to affecting the protections of the First Amendment.

Now for your factual points, which I appreciate your having set down:

1. The testimony, as revised, does not state that William Morrow signed a letter repudiating statements in the book. It does, however, state clearly what is fact: (1) your attorney negotiated the authors' letters; (2) William Morrow and Company paid my legal fees; and (3) William Morrow and Company signed a letter to me saying that changes consistent with the authors' letters would be made in any subsequent printing. This, of course, involves the authors' statements in their letters to me that they "recognize that you did not intend to participate in any activities which would have limited the ability of the Subcommittee to proceed appropriately, that you were not engaged in 'damage control' and that you did not 'prevent' the hearing 'from pursuing many of the most important issues.'" If you will consult the book, you will see that these are the contrary of the most defamatory statements about me in the book. You are entitled to your interpretation of your motivations for doing (1), (2), and (3) above; I am entitled to my own interpretation, which is what I think most people without your direct legal interest would conclude: that you wouldn't have done (1), (2), and (3), if the book contained the truth. In any case, having done (1), (2), and (3), it is perhaps as unseemly as it is disappointing that you say that Morrow "is in no way ashamed" of the statements the book contains.

2. With all due respect, you are wrong here in your reading of what the authors say in the book and in the letters to me. If you will look at the wording you will see that on the most defamatory statements (my attorney and I chose not to focus on every one of the false, misleading statements and innuendos the book contains as to myself and my role and that of the subcommittee -- only on the most egregious and essential ones), the authors do in fact "completely reverse their positions": What they said I did they now say I didn't do. If that isn't a reversal I don't know what is. It doesn't matter how long the negotiations took or what the authors' opinion was when they wrote the book: they have reversed it on the key points. Nothing you might now choose to say changes that at all.

3. I was advised by a reliable source that another publisher looked at part or all of the book in draft and rejected it because it contained statements and charges which were not documented or otherwise supported by the authors. You may be right. I may be right. It's silly to dispute this; I have taken it out of the statement.

4. The reference to others has been omitted as per Mr. Callagy's representation. (See earlier letter to you, same date.)

5. You have this jumbled. I pointed out that you personally did not become involved with Poisoning for Profit, a book in which the reputations of real people were on the line, whereas you apparently did interest yourself more than casually, as reported by the Washington Post, in The Double Man, a work of fiction. Obviously, how you allocate your time is a judgment you must make and just as obviously many others are involved in the publishing and editing process, a fact which I fully understand. But would you not agree there is an irony in this juxtaposition, if not a lesson, for the president of a publishing house? If not, fine, my substantive points remain proven by the record: Morrow was informed of Poisoning for Profit's falsehoods as early as Morrow's receipt of a letter dated November 30, 1984, and again on January 14, weeks before the book was actually received in bookstores and put on sale. The "alleged inaccuracies" were laid before you on both of those occasions and on a continuing basis after January 14; and Morrow entered into negotiations with me as of that date. The facts cannot be revised by your letter: you proceeded to sell the book in uncorrected form after you had been alerted to the very serious falsehoods it contained. (You continue to do so despite the substance of what the authors' letters to me state and the commitment from you not to reprint what the authors have now corrected.) It is also my judgment and that of others knowledgeable about publishing whom I have consulted, that a sound publishing and editing process, whether you were involved in it or not, would have examined and caught these falsehoods before the book was ever printed. Certainly,

this could and should have been so after the falsehoods were first brought to Morrow's attention in writing at the end of November, 1984. You may be proud of this record; I would not be. Painful as it was, I would hope that in your position I would recognize it for the misfeasance any clear eyed observer would see that it is.

Sincerely yours,

Andrew Maguire

AM/jmf

Enclosure

POISONING FOR PROFIT

Organized Crime and Toxic Waste in America

ALAN A. BLOCK and
FRANK R. SCARPITTI

WILLIAM MORROW AND COMPANY, INC.
New York

Foreword

THE POISONING OF AMERICA by the illegal and indiscriminate disposal of toxic and hazardous waste is a problem of enormous magnitude. Industrial poisons are seeping their way into the food chain and the drinking water supply in ways that make it unlikely if not impossible to stop. Among the many reasons why this is so is that organized crime is involved in the illegal and dangerous disposal of the most deadly wastes known to humans.

By "organized crime," we mean certain major criminal syndicates that are lumped together and called by law enforcement the "Mafia" or "La Cosa Nostra." These criminal syndicates are loosely structured, the bonds among members often quite tenuous, and the relations usually competitive not cooperative. And, it is these traditional organized crime gangs, known collectively as the "Mafia," which are involved in the waste industry. In the chapters that follow, we shall detail the ways in which these syndicates and their many helpers in business, politics, and law enforcement are poisoning all of us for profit.

There is little doubt that part of the waste industry has been penetrated, dominated, and controlled by organized crime. Our contention, however, is that organized crime's waste racket is larger and more dangerous to the public welfare than anyone has yet recognized. One of the differences between the waste racket and other businesses run by organized crime is that in matters of waste there are potentially vast numbers of unknowing victims. Unlike gambling, for instance, the public has no choice of participation. No one can simply decide not to be a victim of industrial poisons that have been dumped in landfills, on highways, into sewers, rivers, and streams by organized crime.

Organized crime is not the only culprit involved in this extraordinarily dangerous development. Responsibility for this situation also rests with many of the generators of toxic and hazardous waste. Some of the largest and most prestigious companies in the petrochemical industry knowingly deal with organized crime disposal firms because they provide a cheap way of getting rid of their most harmful wastes. Government, too, has failed in its protection of the public welfare. The laws passed to regulate the toxic and hazardous waste disposal industry have enough loopholes in them to allow the biggest tankers through. And if that isn't enough encouragement for organized crime and its industrial partners, the almost total lack of meaningful enforcement is.

This work could never have been done without a great deal of help from many people. New York State Senator Ralph Marino, the chairman of the New York State Senate Select Committee on Crime, most generously permitted our active participation in his committee's work. Members of the staff gave unstintingly of their time and expertise. We thank Jim Poulos who, year after year, combines intelligence, compassion, and tenacity in his work as the committee's chief investigator. In the same category is Jerry Wendelken, a walking repository of information on New York and New Jersey politics. Both men have worked long and hard combating the toxic waste menace. The other members of the staff, Lorraine Burns, Frnak Reay, and Harriet Sasso, have been good friends and extraordinarily helpful in countless ways. The committee's counsel, Jeremiah B. McKenna, simply embodies the highest qualities of citizenship and scholarship, and we respectfully dedicate this book to him.

Outside the confines of the committee, we acknowledge the fidelity of purpose of Detective Richard "Dirk" Ottens, who will someday be given the recognition and thanks for public service that he so richly deserves. In the same vein, this book has greatly benefited from the work of Detective John Gualavage, and the support of his chief, Joseph Brennan.

Others who have aided us in understanding are Ben Smethurst and Dick Frandsen, staff counsels on the Congressional Oversight Subcommittee. Everyone owes a debt to Hugh Kaufman of the EPA, and Michael Brown, author of the path-breaking book ***Laying Waste***. Both men contributed to our knowledge in significant areas. Interviews with Detectives Bill Grogan and Stan Greenberg from Yonkers and Rockland County, respectively, were exceptionally revealing, and we thank them for taking the time to help us. TRhe repentant William Carracino afforded us an in-depth education in all phases of toxic waste disposal. Also very helpful was Harold Kaufman, now in the Federal Witness Protection Program. Certain detectives from Brooklyn, especially the recently retired Thomas Fitzgerald, gave us the benefit of their experience in dealing with organized crime. Joining Fitzgerald in this sometimes laborious task of education was Detective Kenny McCabe.

Many journalists were helpful and encouraging in our work. We gratefully thank Ben Franklin and Ralph Blumenthal of *The New York Times*, the incomparable Herb Jaffe of the Newark *Star-Ledger*, Victoria Churchville of the Orlando (Florida) *Sentinel*, and Peter Arnett of Cable News Network. Three other reporters, Joe Trento of Cable News Network, John Toth of KYW-TV (Philadelphia), and Bob Windrem of NBC, have done splendid work on toxic waste dumping and organized crime and have also been very helpful. Windrem generously assisted us in understanding the inner workings of the Teamsters. And all who are affected by the horror of indiscriminate toxic waste dumping are indebted to John Fine.

There are many others who provided insight and material but who cannot be mentioned for obvious reasons. We haven't forgotten them, and will thank them privately.

Naturally, without support from our university **this work would have been much more difficult. Many assistants tackled arduous research assignments during the course of this project. For their hard work we thank Maureen Feeny Roser, Charles Schleich, Sharyn Rosenblum, and Patricia Bulger. Our families displayed courage and patience with us and our constant traveling. We are grateful to Marcia Block and Ellen Scarpitti for taking on so many extra burdens which we escaped.**

None of the above is, of course, responsible for any errors or misinterpretations we have made.

Newark, Delaware **A.A.B.**
May, 1984 **F.R.S.**

Contents

there and run the fucking hose down to the fucking woods, man. A whole fucking load man. Tell you some potent fucking shit man.
Yeah?
One minute (unclear) thing you ever see (unclear) made to close that fucking business right down.
What kind of shit, what, what do you mean?
Chemicals.
I know chemicals, but I mean what, what's so bad that you know, I mean the shit melt the rocks or what?
Acid, fucking corrosives, fucking dyes, and all kinds of shit, man, I'm telling you.
Acids and corrosives? In that hospital?
Yeah. Fucking water, ah, main fucking ah, Harriman water pump is right down the fucking across the street there.
Nobody ever checked it?
Well nobody I know. I don't know. Checked the water pump, I guess. I guess they do check it. And that fucking, that water well wasn't in, wasn't drilled through rock either. It was fucking through gravel. It was through fucking sand and shit.
What do you mean? The one they're pumping on?
Yeah, that, that fucking ah,
That artesian well thing there?
Yeah.
That little red brick building?
Yeah. You know, if you could drill a well through rock or you can drill a well through, you know, like just sand and,
Yeah, you don't have to go as deep.
Gravel and shit.
Yeah, right.
But that fucker wasn't through any solid rock.
So all the chemicals were flown right into the fucking thing?
Holy christ.
Holy christ.
Fucking Don came down there a couple of times and raised hell about shit he'd seen (unclear) around that yard there.
But he never did anything?
No, he didn't.
Good old Don Hunter. Is he still there?
An yeah, I guess so. Jeff took, took care of him.

Oh yeah?
He took him there.
Kept the man happy.
Sure.
Paid him right the fuck off.
Yeah. He wouldn't say anything.
He's the kind of guy that wouldn't, you know.
We got, we got three fucking ah, three trucks down in Yonkers now. Fucking lease trucks, their own drivers.
What do you mean? Tractors?
Yeah.

Don Hunter was identified only as a public official in Orange County. Jeff was identified as Jeffrey Gaess, a proprietor of numerous toxic waste companies with ties not only to SCA but also to the organized crime figures who owned the Al Turi Landfill Corp. in Goshen, New York, and finally to the notorious Kin-Buc Landfill in New Jersey.

Going to Washington

A little over ten months after John Fine's testimony and firing, the House Subcommittee on Oversight and Investigations probed some of the SCA story during the course of a one-day hearing. By then, the chairman of the subcommittee was Representative John D. Dingell from Michigan. Congressional interest in SCA and related toxic waste and organized crime matters had been sparked considerably earlier than the May, 1981, hearing, however. Indeed, the Subcommittee on Oversight and Investigations held its first hearing, devoted exclusively to organized crime and hazardous waste disposal, on December 16, 1980, while still officially chaired by Bob Eckhardt of Texas. (In fact, Congressman Eckhardt had been defeated that past November in his bid for reelection, and chose not to attend the December hearing.) Both hearings focused on New Jersey. While the first of these sessions came more than eighteen months after the subcommittee's 1979 hearing, the members had not forgotten either their first probing questions about organized crime and toxic waste in New Jersey or the unsatisfactory response of New Jersey's officials.

One of the first moves made by the subcommittee in preparation of these new hearings had been to contact Detective Dirk Ottens. That initial contact was closed off when Bob Winter of Criminal Justice told Ottens that he wasn't allowed to go to Washington to talk about anything. It seems that the subcommittee's investigators had turned to New Jersey at that time because the state was supposedly moving vigorously ahead with a major investigation. Whether or not that was true, neither Ottens nor his partner, Jack Penney, had let up for a moment in pursuing their investigations. However, the peculiarity of investigating organized crime and illegal toxic waste disposal in New Jersey without help or encouragement was beginning to take its toll on both men.

The frustrations of Ottens and Penney were so great that one day in the summer of 1980, when they happened to be in Trenton, they decided to tell State Police Colonel Clinton L. Pagano what was going on. Before they could do that, though, their captain told them to write down their complaints and problems. Right then and there, he ordered them to sit down and write. They asked for permission to work on their statement at least overnight, which was grudgingly granted, and they returned to Newark, where they had a makeshift office, to prepare their report.

Back in Newark, Ottens and Penney documented their problems in investigating the toxic waste industry, pointing out the innumerable obstacles thrown in their path by the DEP and other agencies. They well knew that the standard operating procedures of the state police, in instances of criticisms of and complaints about other state agencies, called for action by the colonel. What they hadn't anticipated was that most of the action would be focused on them. It was skillfully done, with the end result that both detectives were left out in the cold. Their report disappeared in an endlessly trivial series of bureaucratic maneuvers, which effectively buried the questions and complaints raised by them.

The big chill came unexpectedly. The two men were sitting in their back-room office at the Turnpike station in Newark late in the afternoon on September 18 when a trooper came in and told them they had two visitors. Ottens walked out to the reception area, and the visitors identified themselves as congressional investigators. The investigators had not come to chat; they brought with them congressional subpoenas commanding all the detectives' records and their appearance as witnesses. Ottens told Penney to call their

superiors in the state police and tell them they had been subpoenaed. But it was now at least five o'clock and Penney was unable to reach any of them. While the detectives were gathering up their records, including the summary to Colonel Pagano, Ottens was asked where their secretary was. What secretary? was the answer. The one, the congressional investigators stated, that was written into the grant.

The scene in the barracks was strange, to say the least. Other troopers assigned to the station watched in stunned silence, unable to believe what was going on. In the midst of this, Penney was finally able to get in touch with their major, Anthony DiMassi. Only Penney's end of the conversation could be heard, going something like this:

"Yes sir, Major, this is Detective Penney here. Listen, we just wanted to advise you that we have uh, two members of the U.S. Congress here with subpoenas for all our records. Yes sir, Congress, sir. All our records and their subpoenas, and they've got subpoenas for us to come down to Washington, too. Later, later on. Well, the records? Yes, we keep our records here. This is our office. Well, they already have them. Get them back, sir?"

With that, the congressional investigators stood up and reminded the detectives of congressional power and so on. And Penney said into the phone: "We can't do that, they already have them." Then he hung up and told Ottens they had to report to Trenton the following morning.

The next morning Ottens and Penney reported to divisional headquarters in Trenton. There, they were confronted by two high-level state police officials and Edwin Stier in a very tense meeting. It was clear to Ottens and Penney that there was deep concern over what they might divulge in Washington about New Jersey's inept investigation of toxic waste and organized crime. At this meeting, Director Stier took the lead, reportedly stating that they could destroy both him and the Division of Criminal Justice if they talked about their leads on corruption. All that Stier had worked for, all that he had built up, he said now was in jeopardy. The apparent point of this meeting was to convince Ottens and Penney to be as circumspect as possible when discussing New Jersey's investigation in Washington.

One interpretation of exactly what Stier meant holds that the whole toxic waste investigation was itself grounded on an initial

fraud, and that this explained the missing secretary and other such inconsistencies. A reporter working on the case mentioned to several detectives that there were indications that Criminal Justice was padding the books on the grants it received from the EPA and the Law Enforcement Assistance Administration (LEAA). His allegations that the same people were on both grants, thereby allowing the state to collect double salaries, and of other fraudulent practices never saw print, however. The reporter was hustled out of the state from Newark Airport after he spotted what he believed to be contract killers.

When Ottens and Penney left for Washington a few days after this Trenton meeting, on September 24, 1980, they were accompanied by Major DiMassi. Congressman Eckhardt convened the interview by declaring that the subcommittee was going into executive session. With that he left the room and Ottens and Penney were told to follow him. As they stood up and moved forward, so did the major, expecting to follow them into executive session. At this DiMassi was told that he could not accompany the detectives; that this was an executive session, and he had to leave. He did so, but reportedly went storming around the offices slamming doors and being generally disruptive. As one witness described it, he was "bent way out of shape."

On the very day that Ottens, Penney, and the major left for the rendezvous in Washington, the state of New Jersey returned an important indictment against Duane Marine. The defendants were Duane Marine Salvage Corporation, trading as Duane Marine Corp.; Edward Lecarreaux, the current president; Ronald J. Coelho, a salesman for Duane Marine; Vincent S. Potestivo, the accounts receivable manager; and Peter Hyrcyshyn (known as Peter Harrison), the former president. According to the grand jury, Duane Marine had dumped about 500,000 gallons of chemical wastes into the waters off Perth Amboy, and more than 182,000 gallons of chemical wastes into the Edgeboro Landfill in the town of East Brunswick. If convicted, the total penalties for the corporation and the defendants would come to a possible 120 years in prison and fines of $1,446,000. Given the many questions raised by the entire Duane Marine investigation and its aftermath, it is important to note that Deputy Attorney General Sackowicz presented the case to the grand jury, and the law enforcement units which conducted

the inquiry, according to the indictment, included the New Jersey Inter-Agency Hazardous Waste Task Force and the DEP.

When the indictment was made public, Attorney General John J. Degnan issued a press release which described the case against Duane Marine. The release quoted Edwin Stier, who had reported the 500,000 gallons dumped into the Perth Amboy sewer system and then out into the water, but had undercut the grand jury's estimate of dumping into the landfill by 100,000 gallons. According to Stier, "such investigations are lengthy and complex . . . in this case, 13 witnesses testified before the State Grand Jury, an additional 30 more witnesses were interviewed, voluminous records were examined by investigators and accountants and chemical tests were performed by the DEP." These conclusions, however, would not have been possible but for two actions by Ottens. The first was his insistence that the Duane Marine records be confiscated. The second was the timely and lucky action by Ottens and Penney to prevent those records from going back to Duane Marine in the summer of 1980.

By chance, Ottens and Penney had walked into the Division of Criminal Justice office where the Duane records were kept and asked one of the officers there if they were doing an audit. The startling answer was that the boxes were going back to Duane. Surprised and angered, the detectives started going through the records themselves. Within a very short time, they came up with a case of illegal stockpiling. In addition, they pointed out to the staff attorneys what else could be found in the records and what possibilities existed for prosecutions. Their intervention made it impossible to bury Duane Marine. Interestingly enough, Duane Marine burned down about two or three weeks after the time that the records were supposed to have been returned. Finally on June 5, 1983, *The New York Times* reported that the New Jersey Division of Criminal Justice had announced a recent plea bargain between the state and Duane Marine which resulted in the corporation pleading guilty to drastically reduced charges. Duane Marine paid a fine of $25,000.

The two detectives stayed in Washington for about three days testifying in executive session. The major left on the second day. They returned to New Jersey over the weekend and had to report to Trenton on Monday morning. From September 29 until Novem-

ber 21, 1980, with one exception, they did nothing but sit in a classroom at headquarters. Eight hours a day, they sat. They were told this wasn't punishment, that the brass wanted them close by in case they needed them. Even though it wasn't officially punishment, the bizarre treatment brought forth a complaint from the State Troopers' Non-Commissioned Officers Association of New Jersey, Inc., Fraternal Order of Police Lodge 21. On November 6, the troopers' union unanimously passed an unusual resolution which supported the officers in their actions and concluded:

> Whereas, the superior officers, set over Detectives Sergeant Ottens and Penney in accordance with the rules and regulations of the Division of State Police, failed to respond to the United States House of Representatives Subcommittee on Oversight and Investigations in a timely fashion, which necessitated the issuance of a subpoena compelling the surrender of records and formal sworn testimony of the said Detectives . . .
>
> Whereas, Detectives Sergeant Ottens and Penney have not, since their testimony before the United States House of Representatives . . . been permitted to actively pursue their assigned responsibilities as members of T.W.I.P., namely the collection of tactical intelligence in the area of organized crime infiltration of the illegal disposal of toxic waste. . . .

The facts, the State Troopers' Association held, led inescapably to a resolution of unequivocal support for Ottens and Penney to Colonel Clinton L. Pagano, superintendent of state police. "Their actions," the resolution went on, "are in keeping with the high standards of the Division of State Police and reflect great credit upon themselves and the Division."

While the rank and file of troopers knew exactly what was happening to Ottens and Penney and why, their show of support had no discernible impact on those who could have rectified the outrage. In fact, all during that time when they sat classroom duty, they were approached by different officials in different ways, all trying to find out what they had said in Washington. They even ended up in front of the Attorney General, John J. Degnan, who pounded his desk to remind them that he was their boss. Their

answer was rhetorical: Where have you been up to now while all this was going on?

On December 10 they met once again with Attorney General Degnan, nine days before the public hearing would be held in Washington. He brought enormous pressure to bear on Ottens and Penney to say what had gone on in Washington. New Jersey officials were clearly afraid of what might be waiting for them before the House subcommittee. In desperation, they reportedly talked about making some cases on toxic waste, something, anything to take to Washington. The Attorney General and key state police and Criminal Justice officials even went so far as to call the congressional subcommittee, trying to get permission for Ottens and Penney to talk. The answer from Washington was fairly straightforward: To violate the rules of the executive session was to be in contempt of Congress.

Efforts at damage control did not end with the unsuccessful inquisition of Ottens and Penney. There was one other angle left to play. Among the members of the subcommittee was the lameduck congressman Andrew Maguire, of New Jersey. With Chairman Eckhardt not in attendance, Maguire was the ranking Democrat on the subcommittee. It apparently wasn't very difficult to convince Maguire to stick around Washington that December and chair the hearing. There wasn't much pretense involved in the maneuver. Maguire stated, it has been claimed, that he was there to protect the reputation of both the state of New Jersey and the Attorney General. Some have speculated that the primary reason for protecting the Attorney General came from New Jersey's Governor Brendan Byrne, who favored Degnan as his party's nominee for Governor the following year. Whether that is accurate or not, Maguire certainly prevented the hearing from pursuing many of the most important issues. In addition, New Jersey officials told the subcommittee that most of the specific cases they might want to cover were currently before various grand juries and, therefore, couldn't be discussed. When all was said and done, Ottens and Penney were called in and told by subcommittee staffers that they'd like them to discuss only briefly organized crime and some of the ways that toxic waste is illegally disposed.

While there is little doubt that those with something to conceal succeeded, the very fact that damage control was necessary meant

that much would nevertheless be revealed. For the public, moreover, a congressional hearing on organized crime and toxic waste was a notable event. Even if the full extent of organized crime's involvement would be hidden on December 16, enough would come out to indicate the need for more and more scrutiny, and for at least another public hearing in the following spring.

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Controlling the Damage

When Congressman Andrew Maguire of New Jersey gaveled the December 16, 1980, hearing to order at ten o'clock in the morning, he announced that the subcommittee would be considering two matters: organized crime's involvement in toxic waste disposal, and "the operations of the Federal-State toxic waste strike force in New Jersey, a pioneer pilot program funded under EPA and LEAA grant money." He went on: "This is a pilot program which could well be a model for other States. In this regard, it is appropriate to commend New Jersey for its initiative and foresight in taking the lead." To make sure that New Jersey's position was crystal clear, Congressman Matthew J. Rinaldo, also of New Jersey (who earlier in 1979 had asked those embarrassing questions about toxic waste and organized crime in Elizabeth), stated: "I hope that today's hearing will end unfounded speculations about the New Jersey Inter-Agency Strike Force and provide guidance to the Federal Government and other States embarking on similar programs." Rinaldo added that he believed that New Jersey had only the best intentions in setting up the special strike force. What the unfounded speculations exactly were remained unsaid.

While it is true that the Washington subcommittee investigated the actions and activities of the New Jersey Strike Force, it was not really an all-out effort. Their investigators had more or less stumbled upon allegations of corruption and evidence of laxity in the state's efforts against illegal toxic waste disposal. Washington had thus become privy to information which was potentially very embarrassing to New Jersey. That caused the subcommittee to review more systematically New Jersey's work on illegal toxic waste dumping, and to ask the General Accounting Office to audit the financial

records pertaining to New Jersey's grants from the EPA and LEAA. The questions raised by the investigative reporter who fled New Jersey had reached Washington. Nevertheless, Rinaldo's remarks were more a reflection of the anxiety in New Jersey political and Criminal Justice circles than a response to specific charges from the subcommittee.

This is not to denigrate the subcommittee, however. On the first question facing the subcommittee, it uncovered many of the costs and implications of the illicit disposal of toxic waste, and was beginning forcefully to confront the links between toxic waste and organized crime. At this particular point, though, before new leadership could arrive on the scene, and before it had much time to gather evidence adequately, the subcommittee was also controllable. The clear but unspoken function of the December hearing concerning New Jersey's official efforts against the toxic waste dumpers, therefore, was to deflect criticism and deny a proper investigation. This was damage control at work.

The first witness called that morning was Harold Kaufman, the FBI informant, who Maguire made note had to contact the subcommittee himself to offer assistance. The fact that Kaufman called the subcommittee apparently on his own initiative only one week prior to the hearing indicates something of the depth of the subcommittee's investigation of New Jersey. Kaufman's testimony was carefully controlled at this hearing, through an agreement between the subcommittee and New Jersey officials to restrict his discussion to matters currently under investigation in which he might be a witness.

Accompanying Kaufman to the hearing was Edwin Stier, who commented that Kaufman had been working with the FBI and New Jersey's Division of Criminal Justice for about a year and a half, and was instrumental in the indictments of the New Jersey Trade Waste Association and Duane Marine, which Stier called a major toxic waste prosecution. Before finishing his remarks, Stier reminded the subcommittee of his function. "During the course of Mr. Kaufman's testimony I will try not to interrupt the flow of his testimony. I think it is important that it have continuity. But according to our agreement, you have indicated you would give me the opportunity to indicate those areas that Mr. Kaufman might touch upon which would overlap with the details of some of the cases which are now pending in our State." Along with Stier, New

Jersey was represented by Deputy Attorney General Steven J. Madonna, in charge of the garbage investigation, and Deputy Attorney General Gregory Sackowicz, the leader of the inter-agency toxic waste task force that had developed the Duane Marine case.

Harold Kaufman: Witness for the People

Questioned initially by Congressman Gore, Kaufman described the structure of the garbage industry, noting that grievances over "property rights" were handled by organized crime in its typically violent way—beatings and killings. Within the first two or three minutes of his testimony, Kaufman spoke of two murders. One killing involved an individual who had encroached on the property rights of SCA. It was put on the record that SCA was one of the three largest toxic waste disposal firms in the nation, whose stock was traded on the New York Exchange. Other questions about organized crime, toxic waste, and the concept of "property rights" brought forth this statement from Kaufman: "There is an informal system in the sense where solid waste enters into it. I can't speak about any 100-percent chemical firm, but you got to understand there is multifacet firms, like SCA, BFI [Browning-Ferris Industries], Free Hold [sic] Carting, people like this that do multiwork, they do toxic and solid waste work. With these people, their property rights go right into the toxic." Asked what would happen if someone encroached on the property rights of such companies, Kaufman answered, "You get your legs broke; you get shot."

Congressman Maguire asked Kaufman if what he was saying was that organized crime presently controlled the solid waste industry and was scheming to do the same in toxic waste. Kaufman's reply was not quite on that point, but was nevertheless very revealing. He stated that the manifest system in New Jersey was nothing but a kind of public fraud. All it took in New Jersey to get a hazardous waste hauling license was $50 paid to the Public Utilities Commission. "They made every garbageman in New Jersey . . . hazardous waste haulers." There was no checking on the haulers' qualifications, their knowledge of toxic wastes, nor, indeed, anything else about them. As far as Duane Marine went, it was a complete and utter sham; it had no way of legally disposing of anything. But the first day the state's manifest system went into effect,

Duane Marine received a license to operate as a toxic waste facility.

Clumsily, Maguire picked up where Gore had left off. "I want for a moment to pursue this question of the licensing process," he said. The following interesting exchange occurred:

Maguire: As I understand it, if you haul waste in the State of New Jersey, you can get a license or you were able in the past to get a license. . . . Simply for $50, without an investigation.

Kaufman: $50 to the DEP of New Jersey, and they sent you a sticker.

Maguire: Which doesn't protect the public interest particularly effectively.

Kaufman: Of course not.

Maguire: Is that still the situation?

Kaufman: To my knowledge, yes. As you know, Congressman, being from New Jersey, New Jersey is one of the few States where the public utilities commission controls the sanitation industry. The sanitation industry is treated like every other utility in New Jersey on paper. You can't raise a customer without going through the PUC. You can't do anything. We all know it is a fraud. It is a complete fraud because the company I was with, Statewide Environmental Contractors, raised 300 percent without blinking an eye.

Maguire: Raised the prices they charged?

Kaufman: Yes, because of property rights.

Maguire: What about Duane Marine? What process was required there for licensing?

Kaufman: Lecarreaux was a very good friend of Dr. Buchanan. That is the only reason I know he got a license.

Maguire then stopped his own line of questioning, stating that perhaps they were getting into an area they weren't supposed to. Congressman James Florio of New Jersey, who was attending the hearing as a member of the full committee, asked if Maguire would yield his time for a question. Meanwhile, Kaufman simply went on with his story about the president of Duane Marine, Eddie Lecarreaux, who, he said, "had no more right to be licensed than the man in the moon. Nobody checked our facility before we were licensed, because we didn't have a facility. Nobody checked Eddie's financial statement because Eddie owed everybody in the United States, including the government and the State of New Jersey, on taxes. He was financially shaky. He had no facility. Yet, we were one of the first companies to receive a temporary facility license." Finally, Florio was able to break in, asking whether this area should be covered. Edwin Stier then said that Kaufman was touching on an area that was presently before a state grand jury.

Naturally, we do not know what was before one of the New Jersey State grand juries at that particular time. But it would be surprising if Duane Marine was still one of the subjects being pursued. It was, after all, some two months since the Duane Marine indictment was returned. The indictment and accompanying press release had been issued on September 24.

Under the listing of overt acts committed in the execution of the conspiracy, number 7 in the indictment charged that Lecarreaux "did photocopy a letter of authorization signed by Dr. Ronald J. Buchanan, dated August 7, 1978, the said letter authorizing the Duane Marine Salvage Corp. to dispose of a certain type of industrial waste at any landfill registered to accept such waste." The eighth overt act also concerned Dr. Buchanan's August 7 letter, stating that a representative of Duane Marine gave a photocopy of the letter to someone, "said letter having been addressed to Ed Lecarreaux and signed by Ronald J. Buchanan, Ph.D., Chief, Bureau of Hazardous and Chemical Waste, said letter to be furnished to an agent of the Edgeboro Disposal Inc." The indictment then charges that a Duane Marine representative "did present to an agent of the Edgeboro Disposal Inc., photocopies" of the letter of authorization. What is entirely unclear from the indictment is whether Dr. Buchanan's letter merely authorized Duane Marine to dispose of one type of industrial waste only at so-called landfills registered to accept that type of industrial waste, or whether it authorized Duane Marine to dispose at the Edgeboro Landfill. The phrase, "said letter to be furnished to an agent of the Edgeboro Disposal Inc.," appears to imply the latter.

If that were the case, then there was something very strange about the second charge against Duane Marine. This held that the company dumped over 182,000 gallons of dangerous chemical wastes "to the injury and damage of the employees of the Edgeboro Disposal Inc., doing business as a solid waste facility. . . ."

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Duane Marine, with the authorization from the DEP Bureau chief, did so at the Edgeboro Landfill and thereby broke the law. But perhaps Duane Marine was only allowed by Buchanan to dump a certain category of industrial waste at Edgeboro? The problem, therefore, is twofold: One, did Buchanan authorize Duane Marine to handle hazardous waste or only a certain category of industrial waste; and two, did he authorize Duane Marine to dispose of the material at any registered landfill or was Edgeboro (described in the indictment as only a solid waste facility) allowed by Buchanan to accept other than solid waste delivered by Duane Marine or one of its subcontractors? Also, if Duane Marine was only allowed to dispose of a certain category of industrial waste at Edgeboro, and had dumped other types, then why was that not one of the charges? In addition, if Buchanan and Lecarreaux were close friends, as Kaufman testified, then how likely is it that the Bureau chief was unaware of the very nature of Duane Marine's operation, unaware of what waste his friend's company was taking in? Duane Marine was a fraud from beginning to end, but one with this difference. It had some kind of letter of authorization from the chief of the Bureau of Hazardous and Chemical Waste, Department of Environmental Protection, Dr. Ronald J. Buchanan.

Some indication of the kinds of authorization Buchanan gave to hazardous waste haulers was provided later on when two letters of authorization that Buchanan wrote for the Chemical Control Corporation were entered as exhibits by the Oversight Subcommittee at its next hearing, in May, 1981. One of them may have been similar to the one given to Duane Marine. The first letter went on November 14, 1977 to Michael Dunay, a consultant to Chemical Control, and was fairly general. The second Buchanan letter, directed to Michael Colleton, an officer of Chemical Control was much more detailed. Written on June 12, 1978, it dealt with polystyrene and methyl methacrylate plastics, and noted that "solid polymeric plastic materials as described in your letter of May 15th may be disposed of at any landfill registered to accept industrial waste (I.D. 27)." Buchanan's premission, in this case, was bounded by three conditions, including one which warned that "an inspector from the Solid Waste Administration will be available to inspect such drums for disposal as deemed necessary by the Department." The subcommittee introduced these letters of authorization to Chemical Control because they were used by another party, Waste Disposal, Inc., as authorization to take drums from Chemical Control to the MSLA landfill in Kearny, New Jersey.

Conditional and precise as these authorizations may have been, there was, unfortunately, no follow-up by the Solid Waste Administration or, indeed, anyone else. It seems that no one checked the Chemical Control drums to see if they contained only what Buchanan specified. Without the inspection of drums, of course, any letter of authorization to dump anything anywhere would create unlimited opportunity for fraud. Restraint would depend entirely on the good character of those in the business. In the case of Duane Marine, it is worth repeating Kaufman's assertion that Buchanan and Lecarreaux were friends. The reason that the Chemical Control letters were introduced by the subcommittee was because they were used as cover for indiscriminate toxic waste dumping. Duane Marine was no different. The major unexplored issues, therefore, concern Buchanan's intent. Was he aware of how his authorizations were being used, and if not why not?

In the original Duane Marine indictment, Buchanan was not named as a co-conspirator, not even an unindicted one. Returning then to the December, 1980, hearing, one wonders what Director Stier could have meant when he maintained that Kaufman was touching on issues currently before a grand jury. Buchanan was never charged in any future amended indictments of Duane Marine. Indeed, Buchanan was never a target of any New Jersey Grand Jury investigation that has ever surfaced. His conduct as Bureau chief never seems to have been questioned at all. Compounding this questionable behavior was the strange command from DEP to its field officers to stay away from Duane Marine. There is no evidence indicating that a grand jury was considering any of these matters, after its initial indictment of Duane Marine and its major officers. What Stier was referring to, therefore, remains a mystery, unless it was merely the reflex action of a damage control officer protecting the so-called integrity of a state agency.

Duane Marine was a very difficult topic to avoid, however. Congressman Norman F. Lent of New York brought attention back to it after the New Jersey officials harumphed their way past the Buchanan issue. He asked Kaufman for clarification on several points, including his impression that Duane Marine carted toxic waste. Kaufman corrected him by pointing out that Duane Marine "didn't cart . . . because of property rights." Duane Marine was a

subcontractor acting as a receiving facility. The haulers were garbage companies which had permits to cart hazardous waste, and Duane Marine was the licensed end of the line. Duane Marine solicited business by giving the haulers a cut of their own profits and, apparently, instructing the haulers on how to inflate charges.

The Trouble with SCA

Before ending his testimony at that crucial December 16, 1980, hearing, Harold Kaufman returned to the subject of SCA. He was trying to explain just exactly what it means when garbage and toxic waste companies are one and the same. Kaufman pointed out that SCA had been expanding into many parts of the country during the 1970s by acquiring various independent garbage companies. Kaufman added that SCA had "some of the toughest organized crime companies in the world." SCA had both toxic and solid waste businesses, and was a company "born on the property rights concept." As far as Kaufman was concerned, SCA was an example of garbage racketeers taking over a large part of the toxic waste disposal industry.

The naming of SCA at the December hearing was only the prelude to a larger examination of that company later in the spring. During the last week in May 1981, SCA became the focus of the subcommittee's continuing work on toxic waste and organized crime. By that time the chairman of the subcommittee was Representative John D. Dingell from Michigan, and there were no New Jersey members left. The primary purpose of that hearing, Dingell stated, was to review Kaufman's testimony about SCA presented the past December and to give SCA an opportunity to respond. Dingell then added a sobering story: "Without inferring any connection between the two, it is relevant to this hearing, and of great concern to the subcommittee, to note that last December 22—6 days after Mr. Kaufman testified before this subcommittee—Mr. Crescent Roselle, general manager of Waste Disposal, Inc., one of SCA's largest New Jersey subsidiaries, was brutally murdered in what appeared to be a gangland-style execution." The Roselle homicide as well as two others supposedly linked to SCA matters—the murders of Alfred DiNardi and Gabriel San Felice—were rather prominently discussed during the course of this hearing and will be explored in detail in a later chapter.

What was established at this hearing was that SCA had grown in the fashion described by Kaufman in December. In contention were the claims that SCA's president, Thomas Viola, was an organized crime associate; that he and the SCA corporation were aware of and participated in illegally restraining trade in the waste industry through the "property rights" system; and, undoubtedly, the unspoken claim that SCA was nothing more than an organized crime conglomerate. Various law enforcement officers from New Jersey, including Lieutenant Colonel Justin Dintino of the New Jersey State Police, two sergeants from the State Police Intelligence Division, and Deputy Attorney General Madonna, all offered their opinions that it was inconceivable that SCA (and Viola) was unaware of "property rights" in the waste industry. Needless to say, Viola and the other SCA officers present at the hearing asserted the contrary. On "property rights," Viola stated: "I have no knowledge of the existence of any such system and can state categorically that SCA does not participate in it, if it does exist.

"To the best of my knowledge," Viola added, "no one in SCA has any connection with organized crime, and organized crime exercises no control or influence over SCA." He quickly added, however, that SCA had grown very rapidly by buying out more than 130 garbage companies, and so it was "conceivable that some of the employees who came with some of these companies may have committed crimes or even had contacts with organized crime." Viola also admitted that, as he put it, the past president "had unlawfully converted corporate funds." More detail on this affair was furnished by SCA's chairman of the board, John M. Fox, who accompanied Viola to the hearing and also testified. Fox, who became an outside director of SCA in 1977, stated that in mid-1975 it became known that SCA president Christopher P. Recklitis, and the company's founder, Burton Steir, had conspired to defraud SCA out of millions of dollars.

The Securities and Exchange Commission, in an investigation into SCA's affairs carried out in 1974, had accused Recklitis of diverting about $4 million of company money for his personal use. Joining him in this scheme was Burton Steir and SCA's Northeast regional controller, Nicholas Liakis. Another reported participant in the scheme was Anthony "Tony Bentro" Bentrovato, who was himself indicted in 1975 in a kickback case involving the Upstate New York Teamsters Pension Fund. Also looting pension fund

money was Anthony "Tony Pro" Provenzano, one of the organized crime leaders of the Teamsters. Bentro and Provenzano were convicted of this charge in March, 1978. Apparently, Bentro was a substantial SCA stockholder, having sold a profitable garbage company to SCA in 1973 for $1.17 million worth of stock. Investigative reporter Robert Windrem found that Bentro and his brother had formed the company in 1969, and with the help of political contacts secured important municipal hauling contracts. With the aid of high Teamster officials, they also received extremely favorable labor deals.

Before Bentro sold the waste business to SCA, but well after negotiations had started, he moved into the offices of M & M Trading, which was controlled by Matthew Ianniello, discussed earlier and described by Windrem as New York's most important loan shark, "the gangster who arranged the murder of Joey Gallo at Umberto's Clam House in Little Italy." What Bentro did for Ianniello was to arrange gambling junkets for high-rollers to Caribbean casinos controlled by Ianniello, help in collecting gambling debts with mob enforcer Larry Paladino, and invest in many companies for both Ianniello and Anthony Provenzano. The Teamster Pension and Retirement Fund scam was discussed (and probably planned) at the M & M Trading office by Bentro, Ianniello, Ben Cohen, Provenzano, Jimmy Fiorillo (owner, as noted earlier, of a major New York garbage company), and Larry Paladino. Unknown to these individuals, however, another participant in the talks at M & M Trading was recording the conversation for the U.S. Justice Department. Federal authorities were running an undercover operation, code-named Cleveland, aimed at organized crime's control of the Teamsters Union, and had enrolled the individual as an informant.

The meeting took place in the summer of 1974, about a year after Bentro and SCA had made their deal. It is more than likely, therefore, that the SCA fraud managed by Recklitis, Steir, and Liakis was part and parcel of even larger frauds involving Bentro, Provenzano, and Ianniello. It is also worth repeating the point that even though Viola and Fox were forthcoming in mentioning the fraud, they were adamant in denying any organized crime connection to SCA. They were willing to accept that perhaps one or two of the companies bought early on, in the scramble of expansion, had unsavory owners. But they were not willing (for good reason,

no doubt) to disclose that the founder of SCA, and its president in 1975, mixed and mingled with notorious organized crime figures such as Ianniello and Provenzano. Yet this Bentro connection squarely places the very top leadership of SCA in the midst of organized crime–dominated intrigues—not simply corporate frauds—during that period.

The subcommittee investigators were well aware of some of these issues. That is probably why they introduced as exhibits, in the May, 1981, hearing record, portions of transcripts from the earlier Securities and Exchange Commission investigation of SCA in which Viola was questioned. He testified before the SEC about his family businesses, which included three corporations—Industrial Haulage, Intercity Service, and Avon Landfill—sold to or merged with SCA. Immediately after SCA's acquisition of them, Viola joined the board of directors on the recommendation of Burton Steir. In addition, Viola also became an SCA vice president in 1972. His duties as vice president centered on acquisitions primarily, but not exclusively, in New Jersey. Asked which companies he brought into the SCA fold, Viola stated: "IMPAC Incorporated, Delorenzo Paper Stock Company, Interstate Waste Removal Incorporated, A. A. Mastrangello, Incorporated, United Carting Company, Instant Disposal Incorporated, The Rozelli [sic] Companies, 4, 5 of them, those were in New Jersey. In New York State there was C & D Disposal, [and various companies located in Reno, Nevada, including] Reno Disposal Company." While vice president Viola was also co-director and then director of what SCA called the Mid-Atlantic Region, which included New Jersey and the Philadelphia area. When Viola became president, Burton Steir was again his supporter.

It seems as though the SEC was attempting to establish that Viola was Steir's man, chosen by him to accept leadership positions in SCA including the presidency, all during the time that Steir was looting the company. Could Viola have been so naive, the SEC seemed to be asking, as not to know what Steir, Recklitis, Liakis, Bentro, and others were doing? The congressional subcommittee was also making the important point that Viola was the one who brought into the SCA fold the two murdered waste entrepreneurs, Roselle and DiNardi.

The subcommittee's hammering of SCA in the spring of 1981 was not over yet. Congressman Gore went on to probe another

SCA subsidiary bought in 1972. This one was Tri-County Sanitation of Detroit, whose president was Nicholas Micelli. As far back as 1963, Gore stated, Tri-County had been identified as an organized crime firm. A Detroit police inspector, Earl C. Miller, had stated then that Tri-County Sanitation was run in Detroit by Joseph Barbara, Jr., whose father was the host of the infamous 1957 organized crime meeting in Appalachian, New York. Barbara, Jr., was also the son-in-law of Peter Bitale, one of two brothers who were alleged to be among the leaders of Detroit organized crime. It appears from Miller's testimony that the Detroit operation was a subsidiary of Tri-County Sanitation, incorporated in New York. There is little doubt, however, that Tri-County activities in Detroit were run by organized crime, and that it quickly became a dominant force in the waste disposal industry in the Motor City. Nicholas Micelli, the president of Tri-County when it joined SCA, was, like Barbara, Jr., also Peter Vitale's son-in-law. Questions from the subcommittee to Viola about Tri-County were answered with the refrain that this matter had been under the direction of Burton Steir, and that Micelli had left SCA in 1974.

In New Jersey, the SCA buying spree totaled twenty firms. One of the most interesting was Gaess Environmental Service Corporation, although the subcommittee members paid no attention to it. Perhaps they were unaware of the findings of the New York State Select Committee on Crime on Jeffrey R. Gaess and especially his brother, Anthony D. Gaess. This committee had found that their company, Gaess Environmental, was purchased by the SCA–Earthline Division in 1977. Six years earlier, Gaess Environmental had been called Tony Gaess Service Corp. At that time, its officers were Anthony D. Gaess, president, and Christopher P. Recklitis, vice president. In approximately 1973, therefore, Recklitis, who was very soon to become SCA's president, was in business with Anthony Gaess. Not wanting to belabor the point unnecessarily, it is worth restating that this was just around the time that Recklitis began conspiring to loot the SCA treasury.

Other information gathered by New York State Senator Ralph Marino's investigators indicated that Anthony Gaess was the brother-in-law of Richard Miele, who was believed to be the proprietor of the firm known in the waste disposal trade as Modern Transportation. A chart prepared by the New Jersey DEP indicates that Miele owned 25 percent of the MSLA landfill, which was also

partially owned by the notorious Charles Macaluso. MSLA, located in Kearny, is the landfill in which huge amounts of toxic chemicals have been dumped. Next to MSLA were two more landfills also reported to have been used by toxic dumpers, C. Egan & Sons Sanitary Landfill and the P.M. Landfill.

The procedure for dumping at MSLA was simple; trucks used gate number 2 on the site, which was reportedly opened by a guard who was paid for his service and told to keep quiet. Besides Miele and allegedly Macaluso, others with interests in MSLA included William and John Keegan, Joe Cassini, and the murdered Crescent "Chris" Roselle. Anthony Gaess and Chris Roselle, it turns out, had several common interests outside of MSLA, in which Gaess was represented, it is claimed, by his brother-in-law. According to police intelligence reports compiled by detectives in Elizabeth, Anthony Gaess met with Roselle on a regular basis in order to show him how best to profit in handling chemicals. In these same intelligence reports, it is alleged that Gaess was "caught stealing accounts and running drums of toxic waste" into the infamous Kin-Buc Landfill.

For many concerned with toxic waste dumping and organized crime's involvement, the Gaesses interests are undeservedly unknown. This is so despite the fact that their operations in toxic waste were very large, since they hauled and diposed of toxic waste for some of the major petrochemical generators. Among their customers were: Reichhold Chemicals; Borden Chemical, a division of Borden, Inc.; Air Products & Chemicals; NL Chemicals Division; Refined-Onyx Division of the Polyurethane Specialties Co., of Kewanee Industries, a subsidiary of Gulf Oil; Process Chemical Division of Diamond Shamrock; Soda Products Division of Diamond Shamrock; Lederle Laboratories of American Cyanamid; Millmaster Onyx, a division of Gulf Oil; F & F Department of DuPont; Specialty Chemical Division and Plastics Division of Stauffer Chemical; Mobil Chemical, a division of Mobil Oil; and Pfizer, Inc.

The activities of neither Gaess brother escaped prolonged or intensive law enforcement attention until fairly recently. Anthony Gaess's allegedly illegal activities, his hauling contracts with various petrochemical giants, his business deals with relatives like Miele of MSLA, with crooks like Recklitis, with the murdered Chris Roselle, and with many suspected organized crime figures

have now made him a prime investigative target, however (see chapter 10 for details). Nevertheless, SCA took some pains to try to disassociate itself from Anthony Gaess, and thereby avoid significant financial liability.

Attorneys for SCA Services, SCA Service of Passaic, Inc., Earthline Company, and Anthony Gaess filed a legal brief in the spring of 1979 which denied that Gaess was the principal operating officer of Earthline, the SCA subsidiary that bought Gaess Environmental. This denial was made despite the fact that minutes from a special meeting of the board of directors of Scientific, Inc. (the owners of Kin-Buc Landfill) on June 30, 1975, held that "management has been investigating the feasibility of acquiring from SCA Services, Inc., the Gaess group which consists of SCA's liquid collection business." The Kin-Buc directors were especially interested, first because, as they stated, "the business was run by Tony Gaess aggressively with a view toward expansion"; also Gaess would be the ideal coordinator for Scientific's landfill (presumably Kin-Buc, one year before it was closed as an incredible hazard); and finally, Gaess would be excellent at coordinating their commercial collection operations. They were also interested in buying Gaess from SCA because they understood that the previous year's profits generated by the "Gaess group were $750,000." The reason why SCA was taking so much trouble in this matter was its fear of civil liability in the Kin-Buc case. The brief was filed in answer to a civil action brought by the U.S. Attorney for the District of New Jersey. This suit named Gaess, SCA Services, and nine others responsible for unsafe and improper methods used in handling and disposing into Kin-Buc millions of gallons of liquid waste, much of it highly toxic.

SCA may have been correct in asserting that Earthline was not a Gaess-run company, at least not until after Kin-Buc was shut down in 1976. Earthline did buy up Gaess Environmental the following year, 1977. But the more substantial point is that certain Gaess companies were SCA subsidiaries well before then. Otherwise, there wouldn't have been much point in Scientific's board holding meetings to discuss buying Gaess away from SCA. Gaess probably came on board with SCA when his partner, Recklitis, assumed office, although he may have kept one of his companies, Gaess Environmental, from SCA until 1977. Intriguingly, this kind

of action was also taken by the murdered Chris Roselle, who sold all but one of his companies to SCA.

Trying to figure out all of the Gaesses interests, however, is difficult, for the Gaess brothers seem to have been hidden owners or had substantial interests in several waste companies. For instance, New Jersey DEP records dealing with Gaess are cross-referenced with a firm called R & R Sanitation Service of Randolph, New Jersey, and R & R was in turn a trade name for Carl Gulick, Inc., an industrial waste hauler working out of Mt. Freedom, New Jersey. R & R Sanitation Service, and Carl Gulick, Inc., were both acquired by Thomas Viola for SCA some time in the early 1970s. The Gaess brothers may have had much more substantial involvement with SCA through these other companies than anyone has realized. This is a typical example of what John Fine has called the corporate veils and interlocking directorates characteristic of organized crime's control over the industry.

There is one last aspect of the relationship between Anthony Gaess and SCA that needs to be addressed in this corporate history. Anthony Gaess received a $140,000 loan from SCA in the form of "an unsecured note which is not interest bearing" on September 1, 1975. His payments were due at the rate of $14,000 per year for ten years, starting on September 1, 1976. At least one of the payments was deferred in lieu of Gaess's pledging 3,000 shares of SCA common stock as collateral for the unpaid settlement. This extremely handsome loan arrangement came, it might be noticed, shortly after Scientific Inc. began to discuss purchasing the Gaess interests.

During the May 1981 hearing, the SCA team spent a fair amount of time denouncing Harold Kaufman who was brought back as a witness by the subcommittee. At that time, Kaufman also faced some sharp questioning by Pennsylvania Congressman Marc L. Marks especially over his past record as a bank robber. Interestingly enough, the New Jersey law-enforcement representatives completely backed Kaufman, with Madonna stating that except for dates, "which Mr. Kaufman is not very good at handling, I have found him to be totally accurate." This support, however, raises an exceedingly important issue—the vast difference in tone, if not behavior, on the part of New Jersey officials between their actions in the December 1980 hearing and the subsequent one in May,

1981. By the spring, New Jersey officials were quite outspoken when it came to SCA and allegations about organized crime and toxic waste dumping. In the winter of 1980, however, they had been, to put it mildly, much more circumspect, seemingly much more nervous.

Of course, the difference was probably caused by the shift in the subcommittee's interest and by the nature of the witnesses. In the spring, New Jersey didn't have to deal with Detectives Ottens and Penney testifying, nor with any confrontations involving speculations and rumors about the Inter-Agency Hazardous Waste Task Force. That subject seemed to be closed, and the two detectives safely tucked away from the limelight. The forthrightness of New Jersey officials in the spring thus may have reflected their success at damage control in the winter; they may have felt that they were off the hook. Moreover, it is possible that they had some genuine interest in exposing SCA. One can never discount the complexities of law enforcement, and the fact that protection and exposure are so often deeply wrapped in unknown interests and complex ambiguities. Certainly, New Jersey officials felt the necessity of supporting Kaufman (and keeping him as tightly reined as possible), as he was, after all, their star witness in the trade waste prosecutions. And certainly there was no denying that Roselle had been murdered in organized crime style right after the winter hearing, and that he had been very much a part of SCA's operations. When all is said and done, however, the fundamental difference in the hearings was that the first was much more political than the second, which focused overwhelmingly on SCA. This second hearing simply didn't demand damage control, as it never called into question the integrity of New Jersey's state agencies.

The Integrity of the State

Putting a lid on Duane Marine was not the only example—indeed, not even the most significant—of the way in which New Jersey assiduously avoided sensitive areas in the December, 1980, hearing. New Jersey's unfortunate success in controlling the congressional hearing was most evident when the time came (and quickly went) for the Detectives Ottens and Penney to testify. Their entire testimony was over and done with in a matter of minutes. Additionally, most of the questions put to them were either on issues that they personally hadn't investigated, or were general and abstract in nature. New Jersey's Congressman Rinaldo was very good at asking the unanswerable, and in phrasing his questions made his customary pitch for the virtue of New Jersey. Rinaldo, in fact, took almost as much time praising the state as he did asking questions of substance. And despite what every member of the subcommittee staff knew were the real facts, Rinaldo said boldly:

> As far as I am concerned—and I am sure that every member of the subcommittee and the subcommittee staff will agree with me—we have received excellent cooperation from the State police, in particular, the New Jersey Attorney General's Office the Division of Criminal Justice, and everyone that the subcommittee sought to obtain information from.

Having made his point that New Jersey was doing a splendid job, he then turned to the harassed detectives and asked them several questions about the notorious Chemical Control Corporation. The bottom line, however, as Congressman Rinaldo either did or should have known, was that Ottens and Penney had never worked the Chemical Control investigation.

The only member of the subcommittee to try to develop new information in questioning the detectives was Congressman Gore. He moved the hearing, however temporarily, toward another area of significance by asking the detectives if they knew of "an interrelationship between fuel oil companies and the disposal of toxic waste." Detective Penney responded: "Yes, sir, we received information that this is another area of illegal disposal of flammable toxics. The methodology is such that the toxics, solvents or PCB's, are mixed with [fuel] oil." Penney commented that this brew was sold to public utilities, school systems, and hospitals.

Ottens, answering another question from Gore, described how he and Penney conducted their investigations. This prompted Gore to ask what organized crime "groups or families" were involved in toxic waste. Two crime syndicates were identified: Genovese/Tieri, and the DeCavalcante organized crime group. Penney then remarked, "We learned an individual was employed at a facility in the State as a public relations man with this com-

pany. He is closely aligned or associated with John Riggi, who is a documented member or an underboss of that family member group," meaning the DeCalvacante syndicate.

While not immediately apparent, the hearing had just reached a very critical stage. The facility Penney was talking about was Kit Enterprises, and it presented the state of New Jersey with some extremely sensitive problems. Gore was aware of this, but was hampered by the subcommittee's ground rules protecting New Jersey. Nevertheless, he was determined to get some information about Kit on the record, although he did not identify the facility by name. After Penney's statement, Gore asked a few questions on other matters, and then, seemingly quite out of the blue, said: "What about Jujo Ferrara?" Ottens answered that Ferrara was listed as the public relations man. Wasn't he, Gore asked, the person tied to John Riggi of the DeCalvacante syndicate? The answer given was yes, indeed. And that was as far as Gore could go with the detectives on the subject. Later on, however, the minority counsel, Claire Whitney, was able to get the name of the facility into the record.

At this point Edwin Stier, the director of Criminal Justice, was testifying before the subcommittee. Counsel Whitney wanted to know from Stier how the Division of Criminal Justice coordinated its handling of the Kit case with the state police. Whitney prefaced her remarks by noting that on January 4, 1980, in a Division of Criminal Justice quarterly report to the EPA (such reports were mandated under the grants given to New Jersey by the EPA, and also by LEAA), the project director, Bob Winter, had assured the EPA that a very close liaison was being implemented between Criminal Justice and the state police, which "will assure [a] free flow of information on the critical issue of organized crime infiltration in the toxic waste industry." In light of that statement, Whitney asked if the facts of the Kit case could possibly support Winter's claim. Before Stier answered, she recited some of the facts of the case, as the subcommittee "obtained them from your records": no doubt, some of which came from those originally subpoenaed by the subcommittee from Ottens and Penney.

On May 14, 1979, she pointed out, the Union County Prosecutor's Office filed a report which indicated dealings between Kit and Chemical Control. The report should have gone up the ladder in the Division of Criminal Justice. Furthermore, Whitney noted,

although Criminal Justice formally opened an investigation into Kit five months later, Criminal Justice never appeared to coordinate its surveillances with the state police. In fact, Whitney stated, Detective Sergeant Ottens was watching Kit both before and after Criminal Justice got involved, and he had stated that there was no coordination between Criminal Justice and the state police.

Stier's response was that this was one of those unfortunate instances in which there was a failure of communications. However, he added, this was only one case out of many, and the fact that information didn't flow quite as expeditiously as possible shouldn't be misinterpreted. New Jersey's state police superintendent, Colonel Clinton Pagano, then spoke up in defense of Stier and Criminal Justice, telling Whitney that one of Detective Ottens's reports wasn't sent to Criminal Justice because Ottens had included the name of one of his informants. Both Pagano and Stier attempted to explain away their agencies' botching of the Kit case. Stier's refrain was to look at the context; so much going on, so many cases, inevitably producing confusion. Pagano simply blamed Detective Ottens for poor reporting.

Counsel Whitney, however, was not satisfied. She pointed out that the public safety director of Elizabeth, New Jersey, had told Ottens and Penney of organized crime involvement with Kit as early as February, 1980. They reported this in early March, and yet Deputy Attorney General Sakowicz closed down the investigation on March 24, 1980. Stier replied that "the investigation was closed because no further logical leads appeared to be available to the investigators handling the investigation." To make sure she understood both Pagano and Stier, Whitney asked if they meant that there was never even enough evidence to call for a search warrant by the Division of Criminal Justice. She was told that was a correct interpretation, although she probably knew that it simply wasn't true. What made Kit Enterprises so sensitive was not only its indisputable dumping of toxic waste, nor that it had on the payroll a known organized crime figure, Jojo Ferrara, but that two former deputy attorney generals were part of the Kit family. It is likely that the latter issue was viewed within the Division of Criminal Justice as something critically dangerous, best left unexplored given the possible political consequences of exposure.

Mr. EDWARDS. Our next witnesses form a panel—Mr. Homer Marcum, editor and publisher of the weekly newspaper "Martin Countian," from Inez, KY. Also I believe we have from the National Institutes of Health here in Washington, Dr. Ned Feder and Walter Stewart. Is that correct? Welcome to all of you.

[Witnesses sworn.]

Mr. EDWARDS. Thank you. Welcome to all of you. Mr. Marcum, you may proceed. Without objection, all testimony and addenda will be a part of the record.

STATEMENTS OF HOMER MARCUM, EDITOR AND PUBLISHER, MARTIN COUNTIAN, INEZ, KY; AND DR. NED FEDER AND WALTER STEWART, NATIONAL INSTITUTES OF HEALTH, WASHINGTON, DC

Mr. MARCUM. Thank you. I am pleased to be here today. As I have said in my written testimony, which I will read from, if that is all right, that I am editor and publisher of Martin Countian, the weekly newspaper in Inez, KY. It is not a big paper. We sell 4,000 a week, once a week, but that's all the people in my town need. It seems to cover the news. If they want news from out in the world, they can buy daily newspapers. My bailiwick is my hometown.

I want to tell you about my problems with the courts and libel litigation that has occurred over the last 11 years since I established my newspaper.

During the past 11 years, I have spent over 200 days in court, answering charges that I have been guilty of maliciously writing untruths about public officials in Martin County, KY. That number isn't exact because I haven't been keeping close count of the times that I have had to appear somewhere for a deposition or a hearing before a judge or a trial.

My newspaper and I have been sued for libel seven times. Six of those suits have been filed by the same lawyer who just happened to have owned, edited and operated the then dominant and only weekly newspaper in town. He is also the county attorney. Within a month after the first issue of the Martian Countian was printed, I had been sued for libel.

Now, 10 years and 6 months later, I am still involved in court cases that will take years to clear from court dockets. In the meantime, I have come to love my profession of journalism more, while hating it at the same time because I have come to dread the effect that my words can have.

In the early days, I believed that the first amendment truly did apply to me and what I wrote. Remembering what the House Judiciary Committee had heard during the Watergate hearings, I was full of the belief that the freedom of speech had extended to everyone. I since have learned that it is not true.

Anyone wanting to sue any weekly newspaper editor for libel can do it. All he needs is a complaint and a willing lawyer. Fees don't matter. Some cases are taken on contingency fees. Some are taken for free. To date my newspaper has spent over $30,000 for legal defense of those seven libel actions. All of those seven cases have ended in the newspaper's favor, but legal defense is not cheap. It takes its toll on the person who has been sued. I know.

Now, I dread going near a courthouse—any courthouse. Each time I paste up a story on my front page or an editorial that is somewhat controversial, I stop to think is it worth it. My financial resources are getting such that I cannot afford to say yes too many times when some burning issue in my community needs the benefit of a strong editorial voice. I have been sued for news accounts. I have been sued for editorials. I have been sued for stating my opinion. I have been sued for quoting others, though they were telling the truth.

Let me explain to you how easy it is to get yourself in court in Martin County, KY for libel. Let me show you in doing so how very important it is that newspapers continue to have the freedom to print the truth without legal harassment.

One June 13, 1979, the Martin Countian quoted Helen Horn, the jailer's wife, as saying that she had been involved in a fist fight with the county judge-executive and the county clerk. The fight has taken place in the courthouse after a meeting at the courthouse. Mrs. Horn told the newspaper that Willie Kirk had hit her and run, and that she in turn "whipped up on" Sam Moore, the county clerk.

She had provoked and had only been defending herself, she told the newspaper. The next week, Mr. Kirk's wife sent word to the newspaper that she took offense to the story. None of it was true, she said, and she threatened to sue. And I might add, here, they sent me a letter of retraction saying, "Take it all back." I have yet to learn how you take anything like that back.

None of it was true, she said, and she threatened to sue. I went to see Mrs. Kirk and the next week printed an equally large front page story explaining how Mrs. Kirk and Sam Moore's son, Roger, had said that there had been no fight, and that whatever trouble there had been, it was all Helen Horn's fault. I attempted to interview both men, but they had not been seen around the courthouse for at least two weeks after the free-for-all.

Almost a year just before the statute of limitations had expired, judge and Mrs. Kirk sued, claiming libel. They asked for $407,500 in damages. Three years, seven trail dates—six postponed at the request of the plaintiff—and almost $15,000 later, I got my chance to call Mrs. Horn to the stand before a judge and jury. She told her story, which the jury believed. She has quit hitting the county clerk because she got tired, she told the jury.

It took 10 minutes for the jury to decide that it has believed the story, and therefore no libel had occurred. Despite the fact that these were all public officials and the fight had occurred in the courthouse after a public meeting, Mr. Kirk argued that the newspaper had no right to report his actions. The jury wasn't impressed.

Mr. Kirk's lawyer was his first cousin once removed, the same lawyer who had owned the other newspaper in town, and since it had gone out of business. That was the sixth libel action, and the first that had gone to a jury. The first five were dropped by the lawyer, county attorney, after his client, himself, decided not to pursue the cases any further.

Being naive about all this, I thought that the judge would order the plaintiff to refund my legal expenses and court costs. To re-

ceive those expenses, I would have to sue the plaintiffs and convince the jury the suit had been filed with malicious intent, so I sued, Two years and about $10,000 later, a second jury heard the same evidence, and believing Mrs. Horn's version of the courthouse altercation, agreed to grant legal expenses associated with the trial.

The jury tacked on $5,000 for punitive damages, making the total award just over $21,000. The trial for my legal expenses occurred in January 1985. Just last week, I paid my lawyers the last installment on legal fees incurred for that second trial. The check was for $1,100. I have yet to collect any of the jury's award because the defendant appealed. That case is still awaiting a hearing before an appropriate Kentucky appeals board.

At the rate I am going, I will not be able to successfully defend the frivolous libel action because my financial resources will have been exhausted. My newspaper has been considered a bad risk by libel insurance companies since the filing of the first suit over 10 years ago. Since then I had paid legal expenses either out of the newspaper's proceeds or either out of my pocket, which are the same, by the way.

Many months I have had to go without a salary to make sure the legal bills have been paid. To do that, I have to draw upon personal property to make up the cash shortage at the newspaper. What is the chilling effect of all this? I have had one newspaper press owner who, at the time, was printing my newspaper, tell me that he had the keys to the press and would not unlock it until I could proved to him that I was not guilty of libel.

Well, his father decided that that wouldn't be so, and he told him that he would leave that decision up to the courts. The son was a NASA-trained engineer, by the way. Every time I have been sued, too, so has my printer. My most recent printer now requires each of his print customers to pay all legal expenses coming out of the print job thanks to the high number of suits filed against his company because he had been printing mine.

The chilling effect of all these suits is that it has altered the thinking and way of conducting business for printing companies as well, so they exercise absolutely no control over the content of my publication. If I had not signed a contract agreeing to pay his legal expenses, I would not have continued to print there. That is the chilling effect of libel abuse in simplest form.

Now, I am more cautions with the printed word, I do not believe that courts have anything good to offer newspapers publishers either on offense or defense. Now I let stories pass that I otherwise would have investigated, not for the fear that what I write will be wrong and worthy of a libel action, but out of the fear that what I say might get me sued anyway.

This time in the newspaper's history, one more libel expense just might be the one that it takes to put the newspaper under. Certainly, the mental anguish and sleepless nights that go with being a full-time defendant are more than enough to make one wonder if the first amendment does in fact offer protections to those who live by the word.

I should have added that I have felt like a criminal so long that I forgot to tell you that I fell like one.

Now, how would I go about curing this problem. First, I would expect the Kentucky Bar and the American Bar Associations to better police its lawyers and fine them for filing unwarranted suits. For repeated offenses I would have then disbarred. In some cases, some lawyers having a law degree is a license to get around the law by looking for loopholes in it.

The second cure would be more sure. I would past legislation that protects innocent respondents and libel actions by making the losing party pay the legal fees and court costs of both parties. By taking away the incentive to sue poor newspaper publishers on the hope that the suit itself will have a chilling effect, you take away the biggest obstacle standing in the way of freedom of the press—the inability of its practitioners to pay the legal fee.

If I were writing that legislation, I would ask a 25 percent penalty to any case where it was held that the lawyer had a personal reason for having legally harassed the writer. With this kind of legislation there would be no need to have to sue to recover your legal expenses and court costs incurred in defending a baseline claim. It would be automatic.

Helen and Arvil Horn deserve to have their story told. Judge Willie Kirk testified that he could have put up with about any of the newspaper stories about him. When it printed that he had run from a woman, it was time to sue before it was too late to save his reputation. The fact that Willie Kirk had been sentenced to the penitentiary for four 5-year terms for having stollen money from when he was judge the first time, had nothing to do with his prescious loss of reputation in Martin County, he reasoned.

Readers in my county need to know what goes on with their elected officials. The other six claims were for more frivolously filed suits, if you can believe that. Freedom of the press is not free as long as lawyers can sue newspapers without having to give an accounting of their actions. Freedom of the press is not free so long as newspapers have to sue to recover their legal expenses involved in defending against frivolous actions.

I'm told that because of Gramm-Rudman, I would probably have to pay my own way up here, but that's all right. I would have paid you folks to get to say what I had to say today, because it has become quite an obsession with me.

If first amendment freedoms are to be extended to newspaper publishers in towns like Inez, KY, we need laws that protect those freedoms. While the first amendment guarantees that no law shall abridge the right of freedom of the press and of speech, does not guarantee that no lawyer shall not do what the Constitution declares cannot be done.

If you have any questions, I will be glad to answer them.

[The statement of Mr. Marcum follows:]

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Thompkins

The Martin Countian

Homer F. Marcum
Editor

Phone 298-7570

"The Down-Home Weekly"

Inez, Kentucky 41224

Published by
The Communique
Corporation, Inc.

BRIEF BIOGRAPHY
of Homer Marcum
Editor and Publisher
THE MARTIN COUNTIAN
a weekly newspaper in
Inez, Kentucky

I was born at Hatfield, Kentucky, in Pike County, on December 5, 1947. I am the fourth of five children. My parents are Opal Farley Marcum, a retired first grade teacher, now deceased; and Walter Marcum, a retired coal miner.

In 1957, my family moved to Lovely, Kentucky, in Martin County. I graduated from Warfield High School, two miles away, in 1965.

In 1969, I received a degree in English from Pikeville College, in Pike County, about 60 miles to the north.

In 1969, I began teaching high school at Crum High, in West Virginia. The next year, I was drafted into the Army and served two years at Fort Hood, Texas with the rank of Specialist 5th class.

The following Monday after being discharged, I began teaching in Martin County and finished out the 1972 year teaching physical education at Pigeon Roost Elementary, on land my grandfather donated for the school years before.

The next year, I moved to the county's newly-consolidated high school. When Warfield and Inez High Schools were combined into one county school, in the fall of 1972, the school superintendent so liked his work that he named the school for himself. It is called Sheldon Clark High School.

There, I taught high school English and Journalism, and was the school newspaper and yearbook sponsor.

By 1975, the urge to follow my instincts and start a local weekly newspaper had consumed me, and the first issue of The Martin Countian hit the streets on August 8, 1975.

I quit teaching and became a full-time newspaper owner and publisher.

My then-quiet life hasn't been the same since.

I am married to Terry Marcum and we have two children, Abby, 4, and Brian, 7.

The Martin Countian and I have won several state and national awards for reporting and community service.

Today, I continue as the newspaper's only reporter, photographer, editor and publisher.

In my community, I continue to promote local civic organizations. I am a co-founder and president of the local Community Education Council, a citizens' group formed to meet regularly to promote local education improvements; a co-founder of the Kiwanis Club; a co-founder of the Martin County Fair, and am a member of the board of directors of the Kentucky Press Association.

Each year, the newspaper sponsors a Bullfrog Race at the county fair, to honor the endangered species in Martin County and to educate youngsters about the benefits of protecting our streams and wildlife.

The Martin Countian is an issues-oriented weekly and was the only weekly newspaper named recently by TIME magazine as one of the country's best newspapers.

Our weekly circulation is just over 4000 newspapers sold. The county population is approximately 15,000.

What follows is my recollection of the past ten and a half years in the weekly newspaper business in Martin County, Kentucky.

The Martin Countian

Page 2

Homer F. Marcum
Editor

"The Down-Home Weekly"

Published by
The Communique
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Phone 298-7570

Inez, Kentucky 41224

TESTIMONY OF HOMER F. MARCUM BEFORE THE U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, FEBRUARY 26, 1986

During the past 11 years, I have spent over 200 days in court, answering charges that I have been guilty of maliciously writing untruths about public officials in Martin County, Kentucky.

That number isn't exact, because f haven't been keeping close count of the times that f have had to appear somewhere for a deposition, or a hearing before a judge, or a trial.

My newspaper, and I, have been sued for libel seven times. Six of those suits have been filed by the same lawyer, who just happened to have owned, operated and edited the-then dominant and only weekly newspaper in our town. He also happened to be the County Attorney.

Within a month after the first issue of The Martin Countian was printed, f had been sued for libel.

Now, 10 years and six months later, I am still involved in court cases that will take years to clear from court dockets.

In the meantime, I have come to love my profession of journalism more, while hating it at the same time. I have come to dread the effect that my words can have.

In the early days, I believed that the First Amendment truly did apply to me and what f wrote. Remembering what was said before the House Judiciary Committee during the Watergate Hearings, f was full of the belief then that freedom of speech extended to everyone.

f have since learned that that is not true.

Anyone wanting to sue any weekly newspaper editor for libel can do it. All he needs is a complaint and a willing lawyer. Fees don't matter. Some cases are taken on contingency fees. Some are taken for free.

To date, my newspaper has spent over $30,000 for legal defense of those seven libel actions. All of those seven cases have ended in the newspaper's favor. But legal defense is not cheap.

ft takes it's toll on the person who has been sued. I know.

Now, f dread going near a courthouse. Any courthouse. Each time f paste up a story on my front page, or an editorial that is somewhat controversial, f stop to think, "Is it worth it?"

My financial resources are getting such that I cannot afford to say yes too many more times when some burning issue in my community needs the benefit of a strong editorial voice.

f have been sued for news accounts. f have been sued for editorials. f have been sued for stating my opinion f have been sued for quoting others, though they be telling the truth.

Let me explain to you how easy it is to get yourself sued for libel these days in Martin County, Kentucky. And let me show you, in doing so, how very important it is that newspapers continue to have the freedom to print the truth, without legal harassment.

On June 13, 1979, The Martin Countian quoted Helen Horn, the jailer's wife, as saying that she had been involved in a fist fight with the County Judge-Executive and the County Clerk. The fight had taken place in the courthouse, after a meeting of the county court.

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She had been provoked and had only been defending herself, she told the newspaper.

The next week, Mr. Kirk's wife sent word to the newspaper that she took offense to the story. None of it was true, she said, and she threatened to sue.

f went to see Mrs. Kirk and the next week printed an equally large front page story explaining how Mrs. Kirk and Sam Moore's son, Roger, had said that there had been no fight, and that whatever trouble there had been, it was all Helen Horn's fault. f attempted to interview both men, but they had not been seen around the courthouse for at least two weeks after the free-for-all.

Almost a year, just before the statute of limitations had expired, Judge and Mrs. Kirk sued, claiming libel. They asked for $407,500 in damages.

The Martin Countian

Page 3

Homer F. Marcum
Editor

"The Down-Home Weekly"

Published by
The Communique
Corporation, Inc.

Phone 298-7570

Inez, Kentucky 41224

Three years, seven trial dates (six postponed, all at the request of the plaintiff) and almost $15,000 later, I got my chance to call Mrs. Horn to the stand before a judge and jury. She told her story, which the jury believed. She had quit hitting the County Clerk because she "got tired," she told the jury.

ft took 10 minutes for the jury to decide that It had believed the story, and therefore no libel had occurred. Despite the fact that these were all public officials and the fight had occurred in the courthouse after a public meeting, Mr. Kirk argued that the newspaper had no right to report his actions. The jury was not impressed, however.

Mr. Kirk's lawyer was his first-cousin-once-removed, the same lawyer who had owned the other newspaper in town. ft had since been sold and had gone out of business.

That was the sixth libel action and the first that had gone so far as a jury. The first five were dropped by the lawyer-County Attorney, after his client, himself, decided to not pursue the cases any further.

Being naive, I thought the judge would order the plaintiff to refund my legal fees and court costs. f was wrong. To recover those expenses, f would have to sue the plaintiffs and convince a jury that the suit had been filed with malicious intent.

And so I sued. Two years and about $10,000 later, a second jury heard the same evidence and, believing Mrs. Horn's version of the courthouse altercation, agreed to grant legal expenses associated with the first trial.

The jury tacked on $5,000 for punitive damages, making the total award just over $21,000.

The trial for my legal expenses occurred in January 1985. Just last week, f paid my lawyers the last installment on legal fees incurred in the second trial. The check was for $1100.

f have yet to collect a penny of the jury's award because the defendant appealed. That case is still awaiting a hearing date before the appropriate Kentucky appeals court.

At the rate f am going, f will not be able to successfully defend the next frivolous libel action because my financial resources will have been exhausted.

My newspaper has been considered a bad risk by libel insurance companies since the filing of the first suit over 10 years ago. Since then, f have paid legal expenses either out of the newspaper's proceeds or out of my pocket.

Many months, f have had to go without a salary to make sure the legal bills have been paid. To do that, f have drawn upon personal property to make up the cash shortage at the newspaper.

What is the chilling effect of all this? f have had one newspaper press owner, who at the time was printing my newspaper, tell me that he had the keys to the press and would not unlock it until f could prove to him that I was not guilty of libel. His newspaper had been sued because I hired him to print mine. Lucky that the newspaper owner told his NASA-engineer-trained son that he should leave the decision of libel to the courts or I would have been out of business before the first year was out.

Each time f have been sued, so, too, has my printer. My most recent printer now requires each of his print customers to promise to pay any legal expenses coming out of the print job, thanks to the high number of suits filed against his newspaper because he has been printing mine. The chilling effect of all these law suits has altered the thinking and way of conducting business for printing companies, as well, though they exercise absolutely no control over the content of the publication.

The Martin Countian Page 4

Homer F. Marcum
Editor

Phone 298-7570

"The Down-Home Weekly"

Inez, Kentucky 41224

Published by
The Communique'
Corporation, Inc.

ff f had not signed a contract agreeing to pay his legal expenses, I could not have continued to print there. That is the chilling effect of libel abuse in its simplest form.

Now, f am more cautious with the printed word. f do not believe that court has anything good to offer newspaper publishers, either on offense or defense.

Now, I let stories pass that I otherwise would have investigated, not for the fear that what f write will be wrong and worthy of a libel action, but out of the fear that what f say might get me sued, anyway.

At this time in the newspaper's history, one more libel expense just might be the trick that it takes to put the newspaper under. Certainly, the mental anguish and sleepless nights that go with being a full-time defendant are more than enough to make one wonder if the First Amendment does, in fact, offer protections to those who live by the word.

How would f go about curing my problem? The answer has two parts. First, I would expect the Kentucky Bar and the American Bar Associations to better-police its lawyers and fine them for filing unwarranted suits. For repeated offenses, f would have them disbarred. In the case of some lawyers, having a law degree is a license to get around the law by looking for loopholes in it.

The second cure would be more sure. **I would pass legislation that protects innocent respondants in libel actions by making the losing party pay the legal fees and court costs of both parties.**

By taking away the incentive to sue poor newspaper publishers on the hope that the suit, itself, will have a chilling effect, you take away the biggest obstacle standing in the way of freedom of the press: the inability of its practitioners to pay the legal fees.

ff f were writing that legislation, f would add a 25% penalty to any case where it was held that the lawyer had a personal reason for having legally harassed the writer.

With this kind of legislation, there would be no need to have to sue to recover your legal fees and court costs incurred in defending a baseless claim. ft would be automatic.

Helen and Arvil Horn deserved to have their story told. Judge Willie Kirk testified that he could have put up with about any of the newspaper's stories about him, but when it printed that he had run from a woman, it was time to sue before it was too late to save his reputation. The fact that Willie Kirk had been sentenced to four 5-year terms in the penitentiary for having stolen money from when he was judge the first time, had nothing to do with his previous loss of reputation in Martin County, Judge Kirk reasoned.

Readers in my county need to know what goes on with their elected officials.

The other six claims were for more frivolously-filed civil suits, if that can be believed.

Freedom of the press is not free so long as lawyers can sue newspapers without having to give an accounting of their actions. Freedom of the press is not free so long as newspapers have to sue to recover their legal expenses involved in defending against frivolous actions.

f am told that because of Graham-Rudman I may not be able to charge my expenses of getting here to the government. This is one time that f do not mind having to pay my share of helping reduce the nation's debt. The truth of the matter is that I would have paid you for the privilege of getting to say what has become an obcession with me. If First Amendment freedoms are to be extended to newspaper publishers in towns like Inez, Kentucky, we need new laws that truly protect those freedoms.

While the First Amendment guarantees that NO LAW shall abridge the right of freedom of the press, and of speech, it does not guarantee that NO LAWYER shall not do what the constitution declares cannot be done.

ff you have any questions about any of my legal problems, I will be glad to try to answer them.

Mr. EDWARDS. Well, I believe, if it is all right with you, Mr. Marcum, that we will resist questions until the other two witnesses have testified. But I can't help but comment that I found your testimony very valuable and very interesting and very important. That is very important testimony, what is happening in Inez, KY. It goes right to the heart of our country.

I was married the first time, I might add, in Lexington, KY, many years ago and I have a real affection for that part of the country.

With regard to the members of the Bar disciplining other members, it is a little bit like asking doctors to discipline other doctors. It doesn't get done, and that is one of the reasons why we have so many lawsuits. That is a valuable part of your testimony, too.

Now, who do we want next, Dr. Feder or Mr. Stewart.

Mr. FEDER. I'll be first.

Mr. EDWARDS. You are Mr. Stewart.

Mr. FEDER. I'm Dr. Feder.

Mr. EDWARDS. You are Dr. Feder, yes.

STATEMENT OF NED FEDER, M.D.

Mr. FEDER. Mr. Chairman, my colleague, Walter Stewart, and I welcome the opportunity to appear before the Subcommittee on Civil and Constitutional Rights. We shall describe here our unsuccessful attempts over a period of more than 2 years to publish a report on the frequency of misconduct among biomedical scientists.

With your permission, I will summarize the subject of the research, and he will describe what happened when we tried to publish a report about it.

The two of us are scientists who work as full-time Federal employees in a laboratory at the National Institutes of Health. We synthesize chemical compounds that are used to study the shape of nerve cells, and we carry out basic research on the genetic control of nerve cell shape.

We have long been interested in the professional practices of scientists, a subject that we regarded as important, but rarely studied and poorly understood. There are anecdotes and speculation about the frequency of professional misconduct among scientists, but no solid evidence. In the spring of 1983 we thought of a way to measure how commonly professional misconduct had occurred in a large sample of scientists. The idea was to study a particular group of 47 biomedical scientists about whose professional practices an unusual amount of published information happened to be available.

The members of the group had been coauthors of one particular scientist who, unknown to his coauthors, had forged much of the data on which their publications were based. The forgery was investigated by three committees: in the medical schools where the research had been done, one committee at Emory and one at Harvard; and one appointed by NIH, which had paid for most of the research at Harvard. The public reports of these committees that investigated the forgery contained much information about the coauthors whom we studied. Their private research practices, as well, obviously, as the practices of the person who committed the forgery, were described in the reports, often in detail. It was for this reason that we chose to study this particular sample. We de-

scribed our idea to the editor of "Nature," a leading scientific journal, and he expressed interest in publishing such a study. In the next five months, we obtained the documents we wanted to study, analyzed them, wrote a report on our research, and then submitted it to Nature.

The coauthors in the sample that we studied ranged in experience from novices to department chairmen who had been involved in research for many years. None were known to us, either personally or professionally. Their field of research was completely different from our own. Working with the scientist who had forged data, they had coauthored 109 scientific publications in the fields of clinical and experimental cardiology. We did not name any of the coauthors in our report, but a reader could deduce their identities by studying the published documents on which our report was based.

We approached the subject of our research in the following way: we looked for evidence of misconduct by the 47 coauthors in the reports of the investigating committees and in the coauthors' publications in scientific journals. We were careful to distinguish between the original episode of forgery, which was not the subject of our report, and the practices directly attributable to the scientists themselves.

In the report we wrote on our research, we listed in tabular form all the examples of misconduct we could find in our sample. We also gave detailed descriptions of many specific examples of misconduct. A reader could go to the nearest science library and check the accuracy of most of these descriptions. The rest could be checked by examination of the committee reports.

We found that more than half the scientists in our sample, 35 out of 47, had engaged in questionable practices. Some practices were minor, due to haste or carelessness—for example, failure to exercise sufficient care in eliminating errors from research results about to be published. There was also some fairly serious misconduct, including the publication by several scientists of statements for which the evidence indicates that they knew or should have known of their falsity. About one-fourth of our sample had, according to our analysis, engaged at least once in the more serious type of misconduct. The reported results of the scientists' published research (that is to say the information that they published) were in some instances weakened or invalidated by the effects of their misconduct.

The sample was, of course, not chosen in random fashion. All of them were coauthors of this one particular scientist, and thus our findings may not be representative of those that would be obtained in other groups of scientists. Another study will be needed to answer this question.

In order to help ensure the accuracy of our report, we obtained criticisms and suggestions from more than 100 scientists. The majority praised the report. A minority made unfavorable comments. But aside from three scientists in the sample itself, almost no readers said our descriptions of specific examples of misconduct were inaccurate. In appendix A, I have included a sampling of comments from letters by five journal editors and by 25 other readers, some of them chosen by the editors and not known to us, and others

whom we approached either because we knew them personally or by reputation. All of these are senior scientists.

Mr. Chairman, my colleague, Walter Stewart will continue our testimony and describe what happened when we tried to publish the results of our research.

Mr. EDWARDS. Mr. Stewart.

STATEMENT OF WALTER STEWART

Mr. STEWART. Mr. Chairman, it is a real privilege to be here.

We chose two journals for a formal submission of our report. I might mention everything goes down hill from here. We tried hard, but we havent't been able to publish it.

The two we submitted our report to are two of the world's leading journals of science, and their editors are very well known for being good, and being pretty tenacious. Nature was the one we submitted to first. This journal is published in London and is read by scientists all over the world. On September 26, 1983, we gave a draft of our report to the editor. His reaction was favorable. He said in a letter to us, "This, first of all, is to reaffirm that we shall publish it in some mutually acceptable form in the light of opinions from referees and lawyers. I think that what you have done is an important public service."

On March 20, 1984, the editor, acting with our approval, mailed a draft copy of our report to some of the scientists whose work was discussed in our report and to other persons who were involved. We did this in order to help ensure the accuracy of our report. He received replies from 12 of the 18 to whom he sent copies. Only three scientists alleged specific factual inaccuracies in our description of misconduct. We corrected the few statements that we considered inaccurate in our report.

Two of the scientists hired lawyers, who over the next 18 months threatened Nature and ourselves with libel suits if our report were published. Up to now, the lawyers have produced more than 20 letters and memoranda containing a total of about 150 typed pages. Excerpts from letters written by the scientists' lawyers are given at appendix B. In addition to writing letters, the lawyers made phone calls to the editor of the Nature and to officials at NIH. One of the lawyers had a personal conference with the editor, and another lawyer—from a large Washington law firm—conferred at with the Director of NIH.

In August 1984, 11 months after we had given him our first draft, the editor set a specific timetable for publication. However, he repeatedly postponed deadlines and requested changes in our manuscript, changes that in many cases were similar to those being requested by one of the lawyers. The editor pointed out to us on several occasions that English lible law is stricter than U.S. law. It began to appear to us that the requests for changes might continue indefinitely.

At the time, the changes seemed to us drastic and unnecessary. We were not as familiar then as we are now with the power of the threat to sue. On February 1, 1985, about 16 months and many revisions after the submission of our first draft, we regretfully with-

drew our manuscript from further consideration by Nature in order to seek publication in some other journal.

We next submitted our report to Cell, which is a leading U.S. journal of biology and molecular genetics. On February 6, 1985, we sent a draft copy of our report to the editor. Soon afterwards we sent him a detailed account of our experiences at Nature and photocopies of all the relevant correspondence, including that written by the lawyers representing the scientists. The editor of Cell seemed undaunted by the threats of libel suit and enthusiastic about the prospect of publishing our report. However, he did caution us that before making a commitment, he must hear from his lawyers and from those with responsibility for publication, namely, MIT Press and the authorities at the Massachusetts Institute of Technology.

In a subsequent letter stating that scientists and lawyers might have differing views of our report, this editor said, "Even if the majority of scientists may consider that a practice is unacceptable, it is not clear to me that the lawyers will necessarily share that view, I think we therefore have to pay attention to the legal advice, even though we may be convinced that the article is justifiable on factual grounds." He also said, "I have been somewhat disheartened by the legal advice, I am not sure whether these points can be documented in a way that is simultaneously satisfactory legally and to the reader."

Over subsequent months, the editor of Cell requested an expanding series of changes, most of which we made. After a discussion with the editor on June 21, 1985, we regarded the chances of publication as having gone down a lot. The editor later made it a condition of publication that we promise in advance to indemnify him, all other employees of Cell, and the MIT Press and its employees for any legal costs and liabilities if there were a lawsuit. I might add, that is an awful lot of people we were being asked to promise to pay for.

We argued against this for about a week, but then felt we had no choice and went ahead and signed a promise to do that. At this point, the editor said that if our report were published, certain discussions by us with journalists or others might precipitate a lawsuit. He therefore made it a further condition of publication that we agree in writing not to discuss in any way the process of editorial review at Cell, and not to talk with journalists or others except under certain very rigid constraints.

We declined to accept these conditions. We were disappointed, but we were not surprised when early in November the editor said finally that he could no longer consider our report for publication. Some details of the process I have described briefly are given at appendix C.

Other journals: we have sent our report to 14 other scientific journals for informal consideration by the editors of those journals. We described to each editor the specific difficulties we had experienced with Nature or were experiencing with Cell. We told the editor that if on considering the difficulties and on reading our report, he thought that acceptance for publication was reasonably likely, then we would make a formal submission. Although more than half the editors commented favorably on our report, there

was not a single journal for which it appeared at all likely, even being optimistic, that publication might occur.

A few editors, just to set the record straight, did not rule out the possibility that the report might be accepted for publication if it were submitted formally. But their remarks to us indicated that that possibility was pretty unlikely. For this reason and also because the process of formal consideration is protracted and time-consuming, we decided not to submit our report to those journals. Several editors indicated in letters or conversations that fear of a libel suit was the main factor in their decision. It is our clear impression that these editors were concerned mainly about the costs of defending against a suit rather than the possibility, which I think they regarded as small, that the suit itself would be successful, and in appendix E we given some excerpts from four editors that bear on the question of their feelings about a libel suit in connection with publication of our report.

I should mention that a version of our report is again being considered for publication in Nature. Mr. Chairman, this concludes our statement. Thank you very much.

[The statements of Mr. Stewart and Dr. Feder follows:]

For release upon delivery

Statement of Walter W. Stewart
and Ned Feder, M.D.
National Institute of
Arthritis, Diabetes, and Digestive and Kidney Diseases
National Institutes of Health
Department of Health and Human Services

Before the
Subcommittee on Civil and Constitutional Rights
of the Committee on the Judiciary
U. S. House of Representatives

February 26, 1986

Mr. Chairman, we welcome the opportunity to appear before the Subcommittee on Civil and Constitutional Rights.

We shall describe here our unsuccessful attempts, over a period of more than two years, to publish a report on the frequency of misconduct among biomedical scientists.

The two of us are scientists who work as full-time federal employees in a laboratory at the National Institutes of Health. We synthesize chemical compounds that are used to study the shape of nerve cells, and we carry out basic research on the genetic control of nerve cell shape.

We have long been interested in the professional practices of scientists, a subject that we regarded as important, but rarely studied and poorly understood. There are anecdotes and speculation about the frequency of professional misconduct among scientists, but no solid evidence. In the spring of 1983 we thought of a way to measure how commonly professional misconduct had occurred in a large sample of scientists. The idea was to study a particular group of 47 biomedical scientists about whose professional practices an unusual amount of published information was available. The members of the group had been coauthors of one particular scientist who, unknown to his coauthors, had forged much of the data on which their publications were based. The forgery was investigated by three committees in the medical schools where the research had been done: one committee at Emory, one at Harvard, and one appointed by NIH, which had paid for most of the research at Harvard. The public reports of the committees that investigated the forgery contained much information about the coauthors: their private research practices were

described in the reports, often in detail. It was for this reason that we chose to study this particular sample. We described the idea to the editor of Nature, a leading scientific journal, and he expressed interest in publishing such a study. In the next five months we obtained the documents we wanted to study, analyzed them, wrote a report on our research, and submitted it to Nature.

The sample that we studied

The coauthors ranged in experience from novices to department chairmen who had been involved in research for many years. (None were known to us, either personally or professionally; their field of research was completely different from our own.) Working with the scientist who had forged data, they had coauthored 109 scientific publications in the fields of clinical and experimental cardiology.

We did not name any of the coauthors in our report, but a reader could deduce their identities by studying the published documents on which our report was based.

Subject of the report

We looked for evidence of misconduct by the 47 coauthors in the reports of the investigating committees and in the coauthors' publications in scientific journals. We were careful to distinguish between the original episode of forgery, which was not the subject of our report, and the practices directly attributable to the scientists themselves.

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We found that more than half the scientists in our sample (35 out of 47) had engaged in questionable practices. Some practices were minor, due to haste or carelessness — for example, failure to exercise sufficient care in eliminating errors from research results about to be published. There was also some fairly serious misconduct, including the publication by several scientists of statements for which the evidence indicates that they knew or should have known of their falsity. About one-fourth of our sample had, according to our analysis, engaged at least once in the more serious type of misconduct. The reported results of the scientists' published research were in some instances weakened or invalidated by the effects of their misconduct.

The sample was not chosen in a random fashion and thus our findings may not be representative of those that would be obtained in other groups of scientists. Another study will be needed to answer this question.

In order to help ensure the accuracy of our report, we obtained criticisms and suggestions from more than a hundred scientists. The majority praised the report; a minority made unfavorable comments. But aside from three scientists in the sample itself, almost no readers said our descriptions of specific examples of misconduct were inaccurate.

A sampling of comments taken from letters by five journal editors and by 25 other readers are given in Appendix A.

Attempts to publish

We chose two journals for a formal submission of our report: Nature and Cell. These are two of the world's leading journals of science, and their editors are not only experienced scientists, but are widely respected for their tenacity and courage.

(1) Nature. This journal, published in London, is read by scientists all over the world. On September 26, 1983, we gave a draft of our report to the editor of Nature. His reaction was favorable: "This, first of all, is

. . . to reaffirm that we shall publish it in some mutually acceptable form, in the light of opinions from referees and lawyers. I think that what you have done is an important public service . . . ."

On March 20, 1984, the editor, acting with our approval, mailed a draft copy of our report to some of the scientists discussed in our report and to other persons who were involved. He did this in order to help ensure its accuracy. He received replies from 12 of the 18 to whom copies were sent. Only three scientists alleged specific factual inaccuracies in our description of misconduct. We corrected the few statements that we considered inaccurate.

Two of the scientists hired lawyers who, over the next 18 months, threatened Nature and ourselves with libel suits if our report were published. Up to now, the lawyers have produced more than 20 letters and memoranda containing a total of about 150 typed pages. Excerpts from letters written by the scientists' lawyers are given in Appendix B.

In addition to writing letters, the lawyers made phone calls to the editor of Nature and to officials at NIH. One of the lawyers had a personal conference with the editor. Another lawyer (from a large Washington law firm) conferred at NIH with the Director of NIH.

In August, 1984 (11 months after we gave him our first draft), the editor set a specific timetable for publication. However, he repeatedly postponed deadlines and requested changes in our manuscript — changes that in many cases were similar to those being requested by one of the lawyers. The editor pointed out to us on several occasions that English libel law is stricter than U.S. law. It began to appear to us that the requests for changes might continue indefinitely. At the time, the changes seemed to us drastic and unnecessary; we were not as familiar then as we are now with the power of the threat to sue. On February 1, 1985, about 16 months and many revisions after the submission of our first draft, we regretfully withdrew our manuscript from further consideration by Nature in order to seek publication elsewhere.

(2) Cell. This is a leading U.S. journal of biology and molecular genetics. On February 6, 1985, we sent a draft copy of our report to the editor of Cell. Soon afterwards we sent him a detailed account of our experiences at Nature and photocopies of all the relevant correspondence, including that written by the scientists' lawyers. The editor of Cell seemed undaunted by the threats of a libel suit and enthusiastic about the prospect of publishing our report. However, he cautioned us that before making a commitment, he must hear from his lawyers and from those with responsibility for publication, namely, MIT Press and the authorities at the Massachusetts Institute of Technology.

In a subsequent letter stating that scientists and lawyers might have differing views of our report, the editor said, " . . . [E]ven if the majority of scientists may consider that a practice is unacceptable, it is not clear to me that the lawyers will necessarily share that view. I think we therefore have to pay attention to the legal advice, even though we may be convinced that the article is justifiable on factual grounds," and ". . . I have been somewhat disheartened by the legal advice . . . . I am not sure whether these points can be documented in a way that is simultaneously satisfactory legally and to the reader."

Over subsequent months, the editor of Cell requested an expanding series of changes, most of which we made. After a discussion with the editor on June 21, 1985, on the question of Cell's legal liability, we regarded the chances of publication as falling steadily. The editor later made it a condition of publication that we promise in advance to indemnify him, all other employees of Cell, and MIT Press and its employees for any legal costs and liabilities if there were a lawsuit. We argued against this for about a week, but then we signed. At this point the editor said that if our report were published, certain discussions by us with journalists or others might precipitate a lawsuit. He therefore made it a further condition of publication that we agree in writing not to discuss in any way the process of editorial review at Cell and not to talk with journalists or others except under certain constraints. We declined to accept these conditions. We were disappointed but not surprised when, early in November, the

editor finally said he could no longer consider our report for publication. Some details are given in Appendix C.

(3) Other journals. We sent our report to 14 other scientific journals for informal consideration by the editor. We described to each editor the specific difficulties we had experienced with Nature or were experiencing with Cell. We told the editor that if, on considering the difficulties and on reading our report, he thought that acceptance for publication was reasonably likely, then we would make a formal submission. Although more than half the editors commented favorably on our report, there was not a single journal for which publication appeared at all likely.

A few editors did not rule out the possibility that our report might be accepted for publication if it were submitted formally. However, their remarks indicated to us that acceptance for publication was quite unlikely. For this reason, and also because the process of formal consideration would presumably be protracted and time-consuming, we decided not to submit our report formally to these journals.

Several editors indicated in letters or conversations that fear of a libel suit was the main factor in their decision. It is our clear impression that these editors were concerned mainly about the costs of a defense, rather than the possibility, which they appeared to regard as small, that the suit might be successful.

Excerpts from letters by four editors on the question of a libel suit are given in Appendix D.

A version of our report is again being considered for publication in Nature.

Mr. Chairman, this concludes our statement.

Appendix A: Opinions pro and con: some comments on our report

We quote here from letters or written statements on our report. The great majority of comments we received were favorable. However, we have included in this appendix, for the Committee's information, a disproportionately large number of the unfavorable comments.

Comments by editors

— "I think that what you have done is an important public service . . . ." (Editor of Nature. October 21, 1983.)

— "The consensus of opinion has been that it would be overwhelmingly in the public interest for this article to be published." (Editor of Cell. September 4, 1985.)

In addition to Nature and Cell, we sent our report to 14 other scientific journals for informal consideration by the editor. All rejected it or made comments indicating that acceptance for publication was quite unlikely. Excerpts from letters of three of these editors follow.

— "The Associate Editors felt, in general, that some of the conduct you illustrate in the paper is widely known in the academic community, which is not to say that it is conduct that is regarded as admirable. So, in essence, our decision comes down to a matter of relative priorities. . . . Your study was thorough and admirable." (March 15, 1985.)

— "I do not concur with you that the details of this case are extraordinarily important or that they will affect public policy on fraud. Obviously, from what you report, many other editors feel the same way I do." (July 23, 1985.)

— "The basis for your sample was co-authoring with Darsee. This leaves it completely indeterminate whether or not this population is representative of the larger biomedical research community and its

practices. Notice that one can draw neither conclusion: neither that the practices are typical and represent a general problem, nor that they are specific to Darsee collaborators and represent a specific case only." (August 8, 1985.)

For comments by editors on the question of libel, see Appendix D.

Comments by anonymous reviewers

— "This paper is in fact two papers. The first deals with a very specific example of misconduct on the part of one investigator, and shows how his collaborators and associates were drawn into lending their names (at least) to this misconduct. This first paper is factual (except where it confidently attributes to the collaborators motives that can only be guessed at). . . . The second paper contained in the work of Stewart and Feder is quite different. It is a speculation, based on the incident they have analyzed, to the effect that dishonesty among biomedical scientists may be widespread, that it is a condition to be expected on the basis of the known behavior of medical students, and that the correct way to deal with this problem is to undertake a more general investigation of the honesty of all such scientists. I think there is no scientific basis in the preceding part of the manuscript for such a speculation; it is entirely gratuitous." (An anonymous NIH reviewer who has been identified to us as a member of the U.S. National Academy of Sciences. June 18, 1984.)

In contrast to this criticism, the comments of two other anonymous NIH reviewers were largely favorable.

The following eight reviewers were referees chosen by an editor.

— "I feel very strongly that it would be in the public interest to publish this manuscript, with or without some slight modifications, and I know that its contents would be interesting to scientists and to others concerned with research." (Anonymous reviewer #1.)

— "I have reviewed page by page of the manuscript by Stewart and Feder. This is obviously a highly charged and extremely sensitive subject. The material painful as it is to face has been presented very well and I think fairly. The major thrust of this article it seems is to illustrate the many ways in which investigators may tend to be entrapped wittingly or unwittingly into carrying out fraudulent or scientifically unsound research. The issue of accountability is particularly well stressed. The authors were careful to omit virtually every single name in the Darsee affair other than Darsee and the committee heads or members responsible for institutional review after the discovery of fraud. This attempt to protect many individuals who may or may not be innocent is laudable. . . . Despite its length, I believe this manuscript must be published in order that the medical and bioscientific professions give evidence of their willingness to face the fact that fraud may be committed and that there are reasons as well as motivations how this may occur." (Anonymous reviewer #2.)

— "The authors do not discuss in sufficient detail what the papers they analyze are examples of. . . . The second problem with the paper is that the authors set their own standards for what is and is not acceptable scientific practice. . . . The second part of the paper which deals with setting standards and protection against fraud also makes me uneasy. I do not disagree with much of what Stewart and Feder propose; indeed how could one? I do find the notion of a study involving audits, internal and external, chilling but could understand that others would find it acceptable." (Anonymous reviewer #3.)

— "Should this paper be published? . . . Published anywhere? My answer, yes. I believe that some of the journals who published the original papers, especially several of them, should publish this analysis. Their apparent unwillingness to do so is scandalous and reflects poorly on their editors, and the scientific specialty they represent; to some extent it reflects poorly on all scientists." (Anonymous reviewer #4.)

— "I have no doubt that it would be in the scientific and public interest for Stewart and Feder's analysis to be published. . . . Stewart

and Feder's paper is obviously in an inappropriate format for Cell. That is a disappointment since its subject concerns invalid publishing practices. Like Caesar's wife, this paper must itself be above suspicion, and the presentation of the tables which are difficult to read and interpret does not aid external auditing. . . . On the other hand, one more frequently comes across scientists whose work one simply 'does not trust.' I have had one such person in my laboratory with whom I refused to publish or allow a paper to be published under the name of the institution where we then worked. But to accuse him a fraud without firm evidence would have been libelous. So he is still 'at large' causing similar difficulties in a series of U.S. laboratories, though not as a result of any recommendations I have made orally or in writing." (Anonymous reviewer #5.)

— "I believe that this is an important paper that should certainly be published somewhere. . . . It seems clear that Stewart and Feder are determined that this material will see the light of day. If they are unable to obtain its publication in any reputable scientific journal, this will be a further indictment of the scientific community." (Anonymous reviewer #6.)

— "I do not believe that the paper is appropriate for Cell because the selected subset consists of individuals in the fields of medicine, psychology and animal physiology — all very remote from the readership of Cell. With only a few exceptions, the cited work was published in journals that have zero overlap with the Cell readership, and which as far as I can tell may have entirely different standards of quality and stringency of review. . . . The paper is written in a tedious style which will not appeal to the busy readership of Cell. I would reserve space for more important things." (Anonymous reviewer #7.)

— "In the long run, the public interest will benefit from publication of this manuscript. . . . The potential negative influence of this article on the careers and reputations of Darsee's co-authors, as well as Stewart and Feder, is such that were this a trivial topic I would strongly discourage its publication. The topic of this article is not trivial. There are many who would prefer to ignore what we would like to think is a very rare

occurrence of unprofessional conduct among medical investigators. I take the opposite view. The topic of acceptable 'Professional practices among biomedical scientists' should be discussed repeatedly and openly. . . . In summary, this is a clearly written report of research in an area that is important to the scientific community. Where facts are claimed, they appear to be adequately documented such that the reader can personally verify the claims." (Anonymous reviewer #8.)

Comments by other scientists

The following comments are taken from letters sent to us by senior scientists, most of whom are members of the National Academy of Sciences.

— "In my judgment this is a serious and responsible inquiry. . . . Apart from the ethical issues of scientific responsibility, which are my primary concern, such practices waste large amounts of Government money . . . . [I]t is a responsible endeavor, which is intended to help in maintaining high standards in research, and is therefore intended to serve the interests of the NIH and the scientific community . . . ."

"In my opinion you have performed a real service, by placing the debate on scientific honesty and fraud on a more objective level. . . . Now that you have broken the ice, I trust that other studies will follow; they are obviously needed." (October 21, 1983, and August 5, 1984.)

— "With [your conclusions] I concur entirely. . . . I also feel that one of your conclusions, namely that we ourselves better do the criticism lest others decide to do so for us, is very appropriate. In short, I think the paper is excellent, and I sincerely hope that Nature will publish it." (February 16, 1984.)

— "The topic addressed is one of great importance to scientists and the public alike and, considering that importance, has been little examined. . . . The study described in this manuscript is a serious, constructive

effort to examine a troubling series of events. . . . The work merits publication and widespread discussion, particularly among scientists and academicians." (February 20, 1984.)

— "[T]his is the most detailed review I have ever read of a series of scientific papers. . . . I hope the paper will be printed in its entirety in Nature. It should give very serious cause for thought on the part of many individuals." (July 5, 1984.)

— "No one will venture to deny the facts or contradict your main conclusions." (July 17, 1984.)

— "On the whole you have done a remarkable job and deserve much credit for putting matters that are often repressed or unsupported in a light where that is no longer possible." (August 31, 1984.)

— ". . . I wonder whether your article will lead to rational discourse especially as questions about the publication of inaccurate and republished data, practices in the retention of primary data, qualifications for authorship, the role of collaborators, etc. have been mixed up with other weighty matters such as the correct institutional response to allegations of scientific fraud and misconduct." (December 10, 1984.)

"You do not do a good job of putting the results of your study in perspective. Despite your disclaimers, you imply repeatedly that the practices you ran across are common, even quite common. This implication is likely to stir up enormous resentment and indignation by those who have a strong sense of responsibility to truth. Just present what you know. Let it speak for itself . . . ." (October 30, 1985.)

— "Your paper . . . impresses me as a very thoughtful and thorough analysis of strong evidence of very sloppy practices. . . . The whole matter is very important, and regardless of the embarassment(s) that may result, I feel it is important that other scientists be informed about the facts as you present them. I am therefore even more disturbed by the

evidence that fear of the expense of defending against threated libel suits has apparently caused scientific journals to refuse publication of your paper. This verges on a cover-up. . . . I am afraid that you may have dealt with only the tip of a regrettable iceberg. Our present arrangements in science have an unfortunate tendency to reward those who publish voluminously, and the correcting influence of replication and criticism simply cannot keep up with the magnitude and complexity of the resulting mass of publications. Thus the danger of detection of carelessness, sloppiness, or even worse is relatively slight. . . . [T]he time lag required for [attempts at replication] is often years or even decades, while decisions about grants, jobs, promotions, etc. must be made over a much shorter time span. . . . I feel you have made an important contribution to science. . . ." (November 19, 1985.)

— "I suggest also that you may have constructed too fine a screen, and I make this suggestion with some reluctance. It would probably be a good thing to review all the complicated matters involved with a view to dealing only with those that are, in the words of the law, 'beyond reasonable doubt,' leaving points that are supported by 'the weight of the evidence,' a much less stringent requirement, for later comment. I suppose I am become too pragmatic about some of the points which you, quite rightly, criticize. Overlapping controls, data in text that don't match data in tables (when they should be identical), rushing into print, and even publishing abstracts in several different places with altered titles may not, in the extremity to which we have come in the last thirty or so years, be looked on as anything more than misdemeanors. But contriving data, stealing it from other authors, and <u>fraudulently</u> manipulating it to reach a conclusion that for some reason is desired are felonious, relatively, and I think your initial treatment should focus on those features. I repeat that I make such a suggestion reluctantly because most of the shortcomings you have attacked are less than honorable; and I dislike writing as pragmatist rather than as purist. . . . Your condemnation of honorary authorship is splendid and I hope it will survive. What's more, I think many editors and researchers will applaud — not condemn — your denunciation of the practice. Likewise the insane emphasis on quantity of publication." (November 26, 1985.)

— "I have read your report and took the trouble to look up a couple of the original articles that you cite. I also discussed your paper with two colleagues. It is interesting, revealing, and sobering." (December 26, 1985.)

— "I think is it an important contribution in that it raises important questions about standards in our profession. I am as appalled as you that lawyers should have a veto on what gets published." (December 31, 1985.)

— "I have read the report with much interest. I think it is important that it be published." (January 3, 1986.)

— "So, although I can appreciate your effort — which was clearly with good intentions — I cannot accept your conclusion as being valid. I would guess that most open-minded scientists would feel the way I do, and only those who want to believe that dishonesty is rampant, will embrace your findings." (January 31, 1986.)

— "Finally, I must state my surprise that you chose to take time off from your laboratory research for many months in order to prepare this manuscript. Perhaps it's a puritanical notion that we should use working hours to perform the work for which we are hired and engage in other activities, however professional and meritorious, on our own time such as evenings and weekends." (February 3, 1986.)

— "I am in complete agreement with the major points you have made in your manuscript. I think they should be published. The question is how, in view of the obstacles you have run into. . . . It is often the task of writers, such as yourself, to say what we all know, but bring it into the open and say it well and forcefully." (February 12, 1986.)

Appendix B: Threats of a libel suit

The following excerpts are taken from the correspondence of three lawyers retained by two of the scientists in our sample. We do not quote here any of the long, detailed allegations of error — only some passages that claimed our report was libelous and suggested the possibility of a lawsuit. Our report was under consideration by Nature in 1984 and by Cell in 1985. Note that one of the lawyers specifically requested (May 3, 1985) that copies of much of the legal correspondence for 1984 be sent by us to the editor of Cell. (As it happens, we had already done this.) The threats that seem to have been most effective came from lawyer B. Interestingly, in the final letter quoted below (October 22, 1985), this lawyer asserted that he had never threatened Cell with a libel suit, or even raised the issue of litigation.

— "The proposed article is clearly defamatory to my client and if published will cause irreparable and serious damage to his professional reputation. If such article is published in its present form, it shall be published by you and the authors with actual malice." "The publication of this article in its present form is malicious defamation and will be treated as such. . . . This letter is notice to you and shall constitute such." (Lawyer A to editor of Nature. April 10, 1984.)

— "Your paper as it is presently written unlawfully libels and defames [my client] and others. If you choose to publish it without substantial further revision, I will urge [my client] to pursue all avenues of legal redress available to him." "This false impression constitutes actionable libel per quod . . . . " "This one-sided distortion is in contravention of your legal obligations pursuant to the common law of libel and defamation . . . . Furthermore, you should be aware that the case for libel, strong as it is now, would be immeasurably strengthened if you published the paper after these inaccuracies had been called to your attention." (Lawyer B to Stewart and Feder. June 1, 1984.)

— "This review overwhelmingly confirms the defamatory nature of your paper as it is currently written. . . . The charge that the papers of the Harvard coauthors contained numerous errors is plainly libelous in that it falsely defames the professional reputations of these coauthors. . . . Equally libelous are your five allegations . . . . " "However, please be advised that if it is your intention not to revise the paper, my review of that paper conclusively demonstrates that it is libelous and I will recommend that [my client] take appropriate legal action if it is published either in a journal or by informal circulation." (Lawyer B to Stewart and Feder; copy sent by lawyer to editor of Nature. July 20, 1984.)

— "Although I realize that this is not the final draft of the paper, my review of it indicates that the changes which are being made are primarily cosmetic and do not remotely alter the libelous nature of the paper." "Instead, I would direct your attention to how unmistakably defamatory the Stewart and Feder paper is even after three formal revisions." ". . . . the libel inquiry ultimately turns on whether there has been negligent publication of 'written words which would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community.' Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 853 (1975); accord, e.g., Arsenault v. Allegheny Airlines, Inc., 485 F.Supp. 1373, 1378 (D. Mass. 1980); Mabardi v. Boston Herald Traveler Corp., 347 Mass. 411, 413 (1964)." Footnote: ". . . publication of the Stewart and Feder paper by a journal with national circulation would constitute a separate cause of action for libel in all fifty states. See Keeton v. Hustler Magazine, ___U.S.___, 104 S.Ct. 1473, 1481 (1984) ('[t]he victim of a libel . . . may choose to bring suit in any forum with which the defendant has "certain minimum contacts" . . .')." "In sum, the Stewart and Feder paper continues to be defamatory in manifold respects. . . . As that paper is now written, NIH approval cannot be granted, for NIH Manual Chapter 1184 precludes approval of a paper, like Stewart and Feder's, which violates the law, including the law of defamation." (Lawyer B to Legal Advisor, NIH. August 7, 1984.)

— "In most American jurisdictions, however, malice need not be shown to make out a claim for libel. . . . For similar reasons, I would further note that in a libel action, the authors or publishers charged with defamation bear the burden of proving the truth of their allegations." (Lawyer B to Stewart and Feder. November 21, 1984.)

— "The preceding sections have considered five principal areas in which Stewart and Feder have made false and misleading accusations against the Harvard coauthors. These extremely grave and damaging charges are not the only libelous material in the September 28 Draft. These areas are more than sufficient, however, to make clear that the manuscript should not — and cannot lawfully — be published without substantial changes." (Lawyer B to editor of Nature and to Stewart and Feder. November 14 and 21, 1984.)

— "In the light of these developments I am requesting that NIH take two steps at this time. First, I am requesting that the relevant background correspondence and memoranda we have submitted relating to the draft paper be provided to all journals to which the draft paper has already been submitted, and that in the future these documents also be provided if the draft paper is submitted to still more journals for consideration for publication." (Lawyer C, who is an associate of lawyer B, to the Director of NIH. May 3, 1985.)

— "However, my cursory review of the draft today makes clear that it retains most of the demonstrably false or misleading allegations made in previous drafts, and that its publication would unlawfully libel and defame the Harvard coauthors and other scientists." (Lawyer B to Stewart and Feder. August 26, 1985.)

— "In my judgment, publication of the paper as it presently stands will unlawfully libel and defame [my client] and others." "An additional reason for us providing an explanation in writing is that it may facilitate your informing your editorial board and publisher if you determine that

they should be advised of such a serious matter as the potential publication by your journal of a document which is demonstrably libelous." (Lawyer B to editor of Cell. August 26, 1985.)

— "If the article is published in its present form, it will cause irreparable and serious damage to [my client's] professional reputation, and will be published by you with actual malice." "Since the claim [that there are errors] is a false one which would damage the reputation of the co-authors, publication of this charge, knowing its falsity constitutes libel." "Thus, the charge that [an associate of my client] was an honorary co-author is false and clearly libelous . . . ." "Their accusation that the co-author's motive for changing abstract titles was a wrongful one, is false and damaging to the co-authors and therefore libelous." "The charge [of unacknowledged republication of data] is false and to accuse the authors of dishonesty in this regard, libels them." "Since the charge [of publishing misleading statements] is false and the accusation of dishonesty is damaging, this charge libels the co-authors." "Since this . . . charge of lack of candor is false, and the accusation of dishonesty is damaging, this charge libels the co-authors." (Lawyer A to editor of Cell. September 18, 1985.)

— "As I told you last week, your proposal makes me somewhat uncomfortable, since it might be misunderstood, particularly by Stewart and Feder, as implying we had once threatened legal action against Cell which we have not, or that Cell had made editorial judgments as a result of threats of litigation. In all of our communications I have specifically sought not to raise the issue of litigation in order to avoid even the appearance that [my client] was using the threat of a libel action to influence Cell's editorial judgment. Where I have requested changes be made in the paper, I have done so not on the basis of threats of litigation but on the basis of correcting factual errors in the paper and Cell's editorial responsibility not to publish misleading and incorrect information." (Lawyer B to editor of Cell. October 22, 1985.)

Appendix C: Deterrent effect of threats to sue for libel

It seems clear that the threat of a libel suit was one of the main reasons the editor of Cell decided against publication of our report:

— On several occasions the editor of Cell told us unequivocally that he would not publish our report if he felt a lawsuit was likely to follow its publication. He said he was concerned not only with the expense of litigation, which his journal could ill afford, but with the expenditure of his time.

— There were many telephone conversations between the editor and ourselves — sometimes five per week or more — in which one of the main subjects the editor discussed was how to lessen the possibility of a libel suit.

— At the editor's request, we deleted certain passages from the report. Most contained material to which the two scientists threatening lawsuit had objected. At one point the editor said that he was unsure how interesting our report was with so much material cut out.

Although we produced many versions of our report at the editor's request, almost none of the many changes involved the correction of an error. A few changes were made to improve clarity and prevent a possible misinterpretation. Most revisions, especially those in the final month or two, were apparently concessions made to the scientist's lawyer in order to make his client look better. In some cases, the editor told us this was his reason for making the change; in others it seemed clear to us that it was true. One example: our report had originally contained long, detailed analyses of errors in two research papers from Emory and two from Harvard. The editor asked us to delete completely our analysis of the two that were coauthored by the scientists threatening libel, and to leave the other two. After some discussion, he finally agreed to keep one of the two he had asked us to delete.

— The editor and his lawyer reacted strongly to several incidents that they seemed to think would affect the likelihood of a lawsuit. One such reaction was triggered by an article by Mr. Floyd Abrams entitled "Why We Should Change the Libel Laws" in the New York Times Magazine for September 29, 1985. The difficulties our report had encountered were discussed prominently in this article. Two weeks before the scheduled publication of the Abrams article, the editor stated in a telegram to us: "So far as Cell is concerned, any discussion of your article in the context of the libel laws is simply an incitement to interested parties to sue; and we cannot possibly proceed unless this material is entirely removed."

— During the final months of consideration of our report, the editor told us about his strategy for publishing our report safely: when dealing with the scientist's lawyer, he would offer to modify our report in certain ways, as discussed above, and in exchange he hoped to obtain from the scientist and his lawyer a written promise not to sue. This strategy was described in a letter (October 22, 1985) from the lawyer to the editor: "In our telephone conversation of last Thursday, you suggested that if I could give you assurances that [my client] will not take any legal action with respect to the Stewart and Feder paper then you would undertake, as a matter of editorial prerogative, to make certain changes in that paper along the lines discussed in my previous memoranda and corrrespondence to you." The editor also apparently suggested to the lawyer that if the written promise were not provided, then concessions already made would be withdrawn, and the report would be returned to a previous form. Early in November the scientist's lawyer announced he would provide no such written promise (see Appendix B, letter of October 22, 1985), and a few days later the editor's tentative plans for publication collapsed.

Appendix D: Editors' views of our report on the question of a lawsuit

Here are excerpts from letters on the question of a libel suit by four editors who had informally considered our report for publication:

— "We do not have the resources to take on possible litigation."

— ". . . I am sorry to write that we see no feasible way to use it. . . . Both our publisher and our long-time legal advisor believe that the legal costs incurred would be prohibitive. I am disappointed that we have to send you this negative decision, and that there is nothing we can do to help. It has been sobering to look at your and Dr. Feder's clear and convincing report."

— "The legal ramifications will obviously cause any editor to pause. But I am sure you will have achieved one thing. You have probably made a lot of editors think deeply about the professional and ethical standards of scientists and about how to write on them. I assure you that you have done that to me."

— "I am further disturbed by the trail of events that this paper has elicited, namely to be strung along by several prominent journals and finally shut off because of the legal pressure brought to bear. . . . I am terribly disturbed about publication practices being directed by attorneys. Now it is easy for me to pontificate and exhort courage in others, because [my journal] is simply not the place to publish such stuff. . . ." (An editor had given us this copy of a letter he had sent to the editor of another journal.)

In addition to the possibility of a libel suit, there were other reasons given by the editors for their unwillingness to publish our report.

— The report was too long (but none offered to print it if it were shortened).

— The subject of the report was not suitable for that journal.

— Professional misconduct was already well known to be common among scientists; it was unnecessary to write about it, and probably damaging to the scientific community to do so.

— We had exaggerated the seriousness of misconduct by some of the coauthors in our sample, and we had made the general problem of misconduct appear worse than it actually is.

None said that our description of the facts was inaccurate.

Mr. EDWARDS. Thank you very much. Why don't you have your article published by NIH. They've got deep pockets.

Mr. STEWART. We asked them when Cell turned down our report back in October. We wrote a memo to NIH, the appropriate officials, and requested that they consider publishing it. They haven't yet responded to that.

Mr. SCHUMER. What was the date of the letter to NIH?

Mr. STEWART. Ned, was it October?

Mr. FEDER. I don't remember, but I think October or November.

Mr. STEWART. So it is possible that they are considering the possibility.

It does go a little bit against the tradition which scientists have all voluntarily accepted, which is that things be published in a refereed journal. Most scientists feel that is important, though, there are, of course, arguments on both sides.

Ms. LEROY. Would you explain what that means?

Mr. STEWART. A refereed journal is one—and this is typical for most scientific journals in which anything that is published—that before publication an article is submitted to technical experts for their scrutiny. They look at it, they make comments to the editor, who in most cases sends them to the authors—the fact that the authors really haven't proved what they said they did, or their experiments aren't as good as they think or a whole bunch of technical objections, and scientists feel in general that this is a good process because it helps ensure the accuracy, at least in some sense, the acceptability of what is published.

There is so much pressure to publish these days, at least it keeps the lid on what people publish. That's part of the theory, perhaps. So it would be a little bit of a departure for NIH to publish our report. That might perhaps be a factor.

Mr. EDWARDS. Describe a little bit of the misconduct specifically.

Mr. STEWART. Perhaps we should not have chosen the word "misconduct." Well, let me describe what we have done. We divided what we found into 10 categories of our own choosing, and they ranged in apparent seriousness all the way from things that could be regarded as quite minor to things that I think would have to be regarded as much more substantive. The things I am calling here minor, which may not be minor at all in fact, but the things that were on a lesser scale—how shall I say, of an immediate obvious violation of scientific principles—were things that you could attribute solely to haste and carelessness. That is, the production of a published report in which there were a large number of obvious inaccuracies. That was perhaps our least or bottom category of things that we considered not acceptable.

The practices ranged all the way up to certain instances that we found where you could be—the evidence showed that the scientist either knew or certainly should have known that the thing he was putting his name on was inaccurate, and that is towards the top of the scale. I should add that the scale that we are talking about is a very qualitative scale because it is not at all clear that haste and carelessness, (to take the things that we considered less serious in some sense) may not in the aggregate be a pretty serious thing. So I don't know if that answers your question. It gives the range of practices we detected.

I'll mention another one to sort of flesh out the idea. We found that it was not uncommon for scientists, typically senior scientists, to put their names on publications that they didn't know much about. In some instances they knew nothing about it except that their name was on it, and we found that this was somewhat of an accepted practice, and there are senior scientists who will get up and defend this practice as being a very good thing in some sense. But we argue that is very difficult, in fact, impossible for a person to take responsibility for something they haven't had something to do with, and that it doesn't help the process of scientific verification to have people's names appearing on papers if they don't know anything about the paper. So we included this as a practice, though, as I say, some people would get up and defend it.

Mr. EDWARDS. Could you go to a book and point out—another book, an encyclopedia or an established work on a particular subject and show what they said is white is really black or something like that?

Mr. STEWART. Even more dramatic, that would go to the accuracy of the scientific papers, and we all had experience with publishing—or it is not uncommon, you try to avoid it if you possibly can—experience publishing something that later turns out not to be true, either through an error, a mistake in interpretation, but we didn't count anything like that at all.

We counted instances, for example, in which they published things where there was evidence that they either knew or should have known—and I might say that to a layman, the evidence indicates simply that they knew—the statement was false. But as we became more familiar with the sort of objections that might be raised in court and with the difficulty of proving a state of mind that occurred 4 years ago, we took the statement simply that they either knew or should have known. But the evidence shows that they knew the statement was wrong, so they were putting their name on something that they knew or should have known was not true, and that is much more dramatic than simply publishing something that is inaccurate.

Mr. EDWARDS. Well, these are very interesting witnesses where material, important material, both in Inez, Kentucky, and at the National Institute of Health—we have important material that should be published, it should be made available to the readers, and is not being made available because of the threats of libel.

Mr. Schumer.

Mr. SCHUMER. Thank you. I'll first ask Mr. Marcum some questions and then ask the two gentlemen from NIH. I must say I think all four of the witnesses have been outstanding today in terms of their testimony, really eye-opening, and I hope that we will get some attention paid to this record.

First, from Mr. Marcum, could you just describe in a little more detail—our purpose today is not to draw great legal theories, but just to get some snapshots of instances where the libel law has deleterious effects. Could you describe, in some detail, the chilling effect. For instance, how do you decide what is worth publishing now as opposed to in the past? Would you be more likely or less likely to publish something related to Judge Kirk, for instance, now? Do you think twice—just in terms of the intellectual process.

I don't know how many reporters you have. I am sure, you know, it is not a huge amount.

Mr. MARCUM. I have one; it is me.

Mr. SCHUMER. OK. When Homer Marcum, editor, talks to Homer Marcum, reporter what is the sort of process that goes on?

Mr. MARCUM. In the last few years, the editor has been winning more arguments than the reporters.

I could answer by telling you what I would have done with these gentlemen's work. Ten years ago I would have printed it. Five years ago I would have printed it. Today I wouldn't because I know what the cost of all this could be. For me at has been $30,000. I suppose my lawyers are probably making some phone calls or writing some letters today in response to all this, and the bill is still going.

The chilling effect is a great one. I used to think that anything that your believed to be the truth you could print, and if it weren't you could come back next week and correct that. I don't believe that anymore. I don't believe the correction is the cure. If someone wants to sue, they can do that, so I edit myself more, and in the case of Mr. Kirk, he is no longer judge. The voters took care of that, but they wouldn't have taken care of that had I not done what I did, I don't think.

Mr. SCHUMER. Are there certain stories right now in Martin County that you think ought to be done that you will refuse to do? These are not even stories that are completed, but you know—well, something looks a little fishy there, I better stay away from it.

Mr. MARCUM. Yes. There are stories in Inez, Kentucky, that I know to satisfy what I need to do to avoid libel problems, I have to do more investigating than I ever have the time to do, so I don't do it.

Mr. SCHUMER. That's a sad commentary. Are you the only paper out there?

Mr. MARCUM. There is another one now. He is eight to ten owned by Mr. Kirk the lawyer. Seven of them have folded. The readers are discriminating in Martin County. They don't buy some and do others.

Mr. SCHUMER. Have you ever published a factual mistake, and what is your policy towards retractions?

Mr. MARCUM. My policy is a generous one. If I make a mistake, I will gladly eat my words and in the same place that I wrote them the first time.

Mr. SCHUMER. Right. What do you do if you don't feel it is a mistake, but the other party does quite strongly? Do you put nothing in the paper? Do you put that person's viewpoint in the paper? What do you do there?

Mr. MARCUM. In the case of Mr. Kirk, his lawyer, Mr. Kirk, called me 51 weeks after my retraction—in effect not a retraction, a correction, saying that Mr. Kirk had thought that my first story was inaccurate. He called me to say, "I want to meet with you today, and I want you to take back everything you wrote a year ago." I told him, no, I wouldn't meet with him, and if he wanted to do anything about it, he could talk to my lawyer, and he did in the form of a libel suit.

Mr. SCHUMER. Is there cross-criticism among the newspapers out there in Martin County? If one newspaper will—I mean it is my feeling that we get more of that in the small towns than we do in the big towns. If your newspaper publishes something, do you occasionally get a story in another newspaper that says, "Well, what they wrote in the Martin County paper was wrong."

Mr. MARCUM. For 11 years, the Martin County Mercury, Mr. Kirk's newspaper, has said that I am an SOB.

Mr. SCHUMER. You haven't written that in yours yet.

Mr. MARCUM. Well, I have said that that is debatable.

Mr. SCHUMER. How about on other—well, you are in an anomalous situation, I guess, because he is the only other publisher, and there is a natural antagonism.

Are you familiar with the situation of other small towns and small publications?

Mr. MARCUM. Yes.

Mr. SCHUMER. How does yours differ from theirs?

Mr. MARCUM. They are, for the most part, honorable people, and I don't know any that deliberately tell untruths about others except in Inez, KY, by the Mercury, but that is even debatable. I accept the right for them to say that I am a crook as long as they can prove it. Now they want me to to sue them for libel because I think they know that the next one will put me under. I just won't do that.

Mr. SCHUMER. Let us say—well, let me ask you the bottom line question. Do you believe we ought not to have lebel?

Mr. MARCUM. No, I think there is a very good need for that. I just don't believe we ought to have libel abuses.

Mr. SCHUMER. What would you think of some kind of less costly procedure? Let's say the State of Kentucky Society of Newspapers Publishers had a procedure that wasn't a lengthy court procedure where you go in and tell your side, and Mr. Kirk would go and tell his side, and they would make a determination, and you, being voluntarily part of the association, agreed to publish whatever their finding was.

How would that fit you? What do you think about that?

Mr. MARCUM. I am the publisher that made the motion before the Kentucky Press Association to establish a Kentucky News Council. I believe that is a cure. Now, most publishers don't agree with that. That motion failed. Somehow they perceive that to be prior restraint. I don't. I think that if I am wrong, I deserve to be singled out and everyone told about it.

Mr. SCHUMER. I don't understand their view.

Mr. MARCUM. I don't either.

Mr. SCHUMER. How is it prior restraint?

Mr. MARCUM. The editor of the Lexington Herald stood up at one or our meetings to say that if he is wrong he expects to be sued for it.

Mr. SCHUMER. Obviously they can afford the cost of a suit more than you.

Mr. MARCUM. They can afford it, and I can't. That's right. I think a news council would help a great deal for those people such as the former senator who testified earlier. If you want redress without having to pay all the legal expenses, why not go to a news

council or some impartial group that could pass judgment on the facts of those stories? I'm an advocate of that.

Mr. SCHUMER. Is libel insurance becoming less available to smaller newspapers?

Mr. MARCUM. And less available to me for 10 years.

Mr. SCHUMER. Right. How about in the surrounding towns and counties, are you familiar with those situations?

Mr. MARCUM. I haven't heard. I don't know.

Mr. SCHUMER. You ever check with a lawyer before publishing something controversial? More now than before?

Mr. MARCUM. I don't now, because I think I have become a pretty good libel lawyer myself with on-the-job training. But in the beginning I did a great deal of that.

Mr. SCHUMER. If the threat of damages was removed, let's say you could sue just to get a retraction, would that change your situation at all?

Mr. MARCUM. Sure. I wouldn't have had to pay all the legal expenses.

Mr. SCHUMER. Well, that would be if the court costs——

Mr. MARCUM. I would have welcomed that.

Mr. SCHUMER. In other words, if you had a proposal that said no damages and whoever wins the suit pays the court costs, you think you could live with that.

Mr. MARCUM. Yes.

Mr. SCHUMER. Given your record of winning suits, I suppose you would, but you are going to lose one sooner or later. I mean our system of justice is hardly perfect. Could your paper shoulder the court costs if you lost?

Mr. MARCUM. I can't even afford to win one.

Mr. SCHUMER. You seem to be an open and frank person. You are not concerned that if you publish something that was a mistake that your own reputation would be damaged.

Mr. MARCUM. No, I believe that would add to my reputation as being a fair, open and honest publisher.

Mr. SCHUMER. You think most publishers feel similarly to you?

Mr. MARCUM. I think they believe that.

Mr. SCHUMER. Thank you. I have questions for the scientists, Mr. Chairman. Do you want to go ahead.

Mr. EDWARDS. I have a question for Mr. Marcum. Why don't you do your own printing?

Mr. MARCUM. I can't afford a press. It cost several hundred thousand dollars to do it right.

Mr. EDWARDS. 4,000

Mr. MARCUM. Several hundred thousand.

Mr. EDWARDS. I meant just for 4,000 copies.

Mr. MARCUM. Well, you still have to own a press that prints hundreds of thousands to be able to have one that prints 4,000. Most weekly newspapers in the business do what I am doing. They just time-share a press and hire out the work that others do for them. It only takes me an hour's worth of print time to print 4,000 papers, but I would have to pay for a press—that's a lot more expensive.

Mr. SCHUMER. I am not familiar with state libel laws. I guess in Kentucky they allow the printer to be sued.

Mr. MARCUM. I think the way that works is they don't disallow it, and because they don't disallow it, this lawyer elected every time he sued, even though he himself was a publisher and knew that those people had no control over my paper, sued my printer, and I am sure that was just for the purpose of harassment.

I might add also, this is not in the area of libel abuse, but the same county attorney had me arrested four times for contributing to the delinquency of a minor. He said that I had hired little newspaper boys to sell my newspaper on school time. Those were the same four little newspaper boys that sold his newspaper.

Mr. SCHUMER. But you don't know if that—we will check if the law allows suits against printers or if this was just a means of harassing you to cut off printers from you.

Mr. MARCUM. I look at that like suing the telephone company for being the owner of the telephone line.

Mr. SCHUMER. Thank you.

Ms. LEROY. Are your printers having insurance problems as well as a result of this?

Mr. MARCUM. Yes, they are. They now require me to pay their legal expenses. I signed a contract to that effect. All of their customers now have to pay those legal expenses.

Ms. LEROY. Thank you.

Mr. SCHUMER. I now have some questions again for the NIH scientists, unless the Chairman has some questions. Thank you, Mr. Chairman. And, again your testimony is astounding.

I have a question, and I guess I would ask Mr. Marcum to answer this, too, and it certainly applies to Congressman Maguire, which is you feel this a cause already.

Obviously the time and effort you have put into this—you have your jobs at NIH, it has become sort of a major cause for you to get this work published to prove that the system can work. Is that a pretty accurate way to put it?

Mr. STEWART. I think that is fair. Ned?

Mr. SCHUMER. Go head whoever would like to. I just want to get your personal feelings about what has happened and how you have been stymied in getting some very important work out.

Mr. FEDER. Well, we started work on this idea initially because we thought we had an unusual and very good idea for finding out something that nobody knew anything about, about which there was a lot of speculation. People speculate on the one hand that misconduct is rare among scientists, and on the other hand that it is common. We thought we saw a way of beginning to open the door to that question. We put in a relatively small amount of work into reaching what we thought was the answer, a half a year, and we still think it is important, and we think it ought to be published so that the scientific community as a whole can discuss it.

Mr. SCHUMER. And as I understand it, this kind of study had not been done before anywhere.

I see you are nodding your head.

Mr. STEWART. Yes, that's correct. That is what we think.

Mr. SCHUMER. And if it were to be published and become known, it would cause quite a few shock waves throughout the scientific community. Is that accurate?

Mr. FEDER. That's possible or likely. Judging from the comments we have gotten, it seems likely.

Mr. SCHUMER. It certainly throws into great question the whole method of scientific research, at least in a percentage of the articles published. Is that fair to say?

Mr. STEWART. That's accurate. In a percentage, the question—we would all like to think the system works well most of the time, and it certainly works well some of the time, because science does make progress, and we are raising the question of what that fraction is. I think that is an important question in a variety of ways that may rub some people the wrong way and may also stimulate a lot of discussion.

Mr. SCHUMER. Right. Question, and either gentlemen can answer any of these questions—either or both can feel free to jump in. What were the publishers most afraid of that caused them to turn you down? Was it the cost of defending against a libel suit, or the potential damage judgment against them, that they might actually find that your stuff was libelous?

Mr. FEDER. Well, the editors did go to some trouble to determine the accuracy of our report. They had it refereed, and in fact I think it was more heavily refereed than most papers are. I think, judging from their comments, they were satisfied as to the truth of what we were saying. As you were saying, it is not clear how courts will act, invariably, but it appeared to us from their comments that they were more concerned about the costs of litigation than they were about damages at the end, and at least one editor spoke a good deal about the amount of time that he would have to take away from other things that he was interested in doing, if there were a lawsuit.

Mr. SCHUMER. So the wear and tear actually of a potential lawsuit, regardless of the outcome, seemed to be quite of great concern to at least one publisher, and perhaps more than that.

What would have changed the situation? In other words, what did the publishers ask for in order to publish your study? For example, did they say, well, if you took this out, took that out kind of thing?

Mr. STEWART. We came to the position pretty quickly that we would do anything to get our main points published, and in fact we would get rid of half of our main points, or indeed in certain cases, nine-tenths of them. We think it is more important to get something out on the subject and get people beginnng to talk about it. So there were no changes—as sort of a matter of principle, we would make any changes that anyone wanted so long as the resulting article was accurate.

For example, we even proposed to remove the two people who had hired lawyers, remove them entirely from the study, and simply say there were 47 scientists, but we will discuss 45. There is some scientific reason why that isn't an optimal thing to do, and yet we are willing to go with just about anything that would please any editor, and yet we haven't found any takers.

Mr. SCHUMER. From how you describe it, publishers are quaking in their boots about libel suits.

Mr. STEWART. I think that is fair. Ned?

One of the points I wanted to add was, you ask about what was in their minds, and we really don't know what is in their minds. But based on the fact that they continually bring up libel, I do believe that—I think we have seen some first-hand evidence of the fact that—that really is in their minds.

Mr. EDWARDS. If the gentleman would yield, we just have a rash of books lately—one by Rita Lavelle; one by Ann Burford, that name names and do everything else. Publishers don't seem very shy about printing those. Why? Is it because they are going to make a lot of money on it?

Mr. STEWART. Possibly so. One of the things that came to our attention later on is that scientific journals are in the same situation as the editor of this paper is. They are small. They can't afford lawsuits the way larger publishers can. They don't expect to sell very many scientific journals. It is a narrow market and so forth. So you are looking at people who can't necessarily defend a lawsuit.

Mr. EDWARDS. Well, they are just going to write mush then if it is not going to be controversial and hard-hitting. Maybe they better go out of business or maybe they better start to complain. I haven't heard any complaints from them.

Mr. FEDER. Well most of the time scientific journals publish things that are not at all controversial, or if they are controversial, only in a very abstract sense, and another scientist will publish a contradiction a year later saying that the interpretation of this paper is wrong, and here is my interpretation. But there are really not very hard feelings over that. I think this is a very unusual article for a scientific journal.

Mr. SCHUMER. But that's a good point. Do you know of other instances in the more everyday, if you will, sense where a scientist has said the work done by Smith a year ago is wrong? That obviously happens in scientific journals, or should, all the time. Any suits that you are aware of that would chill?

Mr. STEWART. Quite a few. As we started talking to people and showing our article to distinguished scientists, 1 out of 10 certainly had direct experience with a person who had forged data, in his belief, in his own laboratory, and we have known of many cases where people felt unable to do anything about it on account of laws—the legal risk it would open them up to. So we found that the subject was very much on everyone's mind, and people felt that they couldn't say anything.

Mr. FEDER. And so they did nothing.

Mr. SCHUMER. Not just in your area.

Mr. FEDER. That's right. And so these scientists who were strongly suspected of having committed misconduct in the lab were simply allowed to leave the lab and perhaps go to other laboratories to work because the persons who were aware of the misconduct were afraid of being sued.

Mr. SCHUMER. So you think scientific discourse is really being harmed by these threats of suits in general, not just in the area that you are talking about.

Mr. FEDER. I believe so.

Mr. STEWART. We should qualify that and say scientific discourse about misconduct, perhaps not about the more abstract issues.

Mr. SCHUMER. That was my question. How about in the more abstract area, not about misconduct, but just about debate. I don't want to even give an example because I am sure that it will be wrong, but you know that a quark is this, and someone else says, "Hey, Smith is all wet. A quark is that."

You ever get suits in that kind of situation?

Mr. STEWART. We haven't heard of that.

Mr. FEDER. I don't think so.

Mr. STEWART. As Ned said, that doesn't offend anyone except the author of the statement that a quark is whatever.

Mr. SCHUMER. Right. But why couldn't that person go ahead and sue? Why couldn't Smith go ahead and sue and try to prevent publication in that way?

Mr. FEDER. It certainly has always been part of the scientific tradition that this sort of controversy appears on the pages of scientific journals. As far as I know, there have not been lawsuits over it.

Mr. SCHUMER. Why doesn't libel insurance offer adequate protection? In other words, don't Cell and Nature have libel insurance? We don't stop driving cars because we are afraid we are gong to be sued if someone hits us or we hit them mainly because, you know, we have insurance, and not only does the insurer reimburse except for a deductible, but they handle all the wear and tear. Why isn't that the case in the scientific publishing area? Do you have any answer?

Mr. FEDER. I dont't know.

Mr. EDWARDS. Surely in some of the institutions—and I am sure some important institutions are involved in this—universities and colleges and so forth. Surely, the powers that be there know something about this work, because I have heard of it before, and if I have heard of it, everybody has. Surely they know that they have scientists there whose work has been criticized very severely in a very derogatory manner.

Do they know just because of hearing about you article, and have they done something about these scientists? Have they fired them or disciplined them or anything?

Mr. STEWART. I'm not sure I can answer that directly. I'm not sure we know directly, but our study raises the question of whether these are aberrant acts or whether they may not be more common, and certainly our intent was not to say this person has done something wrong. We tried to stay away from individuals and towards the group behavior. We don't know whether what we are observing is typical or not typical. We just don't know.

If they asked us what they should do, we would say—I guess Ned and I would both say forget about the individuals concerned in this particular case. Let's study the phenomenon. It wouldn't be too much use, in my view, let's say, to single out the people who happened to be studied by us. We should find out if these things are common, and if so, it would be a much more serious question.

But to answer your specific question, I am certainly not aware of anything that has been done.

Mr. EDWARDS. I know we have an instance at Harvard where a professor in violation of Harvard's rules held a conference which was secretly subsidized by the CIA. When Harvard found out about

it, it conducted its own investigation and the appropriate discipline was applied.

It seems to me that if you described in your book some misconduct that some of these institutions would have heard about it and looked into it insofar as their own scientists were concerned. These are very serious allegations.

Mr. FEDER. Let me emphasize what Walter said. It was not our purpose to single out the individuals in this group who may have committed misconduct. Although we didn't name them, we included enough identifying information in our paper so that they could be identified, but our reason for doing this was so that—there were two reasons for our doing this.

Number one, it is customary in scientific publications to provide data. In this case, "data" means the information in the papers we were writing about, specific examples of mistakes, for example. The second reason is that this made our paper verifiable. A person who doubted that what we were saying was true could go to the library and check out what we were saying, and it was for that reason primarily that we included so much specific information.

It did have a secondary effect, that a person intent on doing so could find out who we were talking about.

Mr. EDWARDS. Mr. Schumer.

Mr. SCHUMER. Would you gentlemen—I asked this question of Mr. Marcum before. Would you be in favor of abolishing libel laws or constricting them greatly, given your experience?

Mr. STEWART. I think, based on my case—we don't represent HHS policymakers, of course. I know so little about the situation, only what I have learned today, but I don't really have an opinion on that. Ned.

Mr. FEDER. I would go a little bit further and say that what we are dealing with here is the motives of the person who was threatening to sue and the motives of the editors in saying what they said, and it is very difficult to make any guesses based on that.

Mr. SCHUMER. How would you feel if somebody had published such an article on your research, you know, not this particular research, but something else that you had done? Wouldn't your reaction be the same, to go sue and try to stop it from being published?

Mr. FEDER. I would hope not. I would hope that I would try to resolve the dispute on the pages of scientific journals.

Mr. STEWART. There is a long tradition for doing just what Ned says, and you would have to have some very strong reason for departing from that. I think the first reaction of most people would be to say give me space, too, I want to present my case.

Mr. SCHUMER. And that space, probably, you are pretty certain, would have been available to the people who criticized you. What they were trying to do is prevent anything from being published all together.

Mr. STEWART. That's correct.

Mr. SCHUMER. Finally, how will this experience affect your work in the future, Will you no longer look into this particular area of misconduct by your fellow scientists and go back to your original fields of research?

Mr. FEDER. It was our hope right from the beginning to do this one single piece of work for which we happened to get a good idea, and then return to our normal work in the laboratory.

Mr. SCHUMER. Is that the course you are pursuing now?

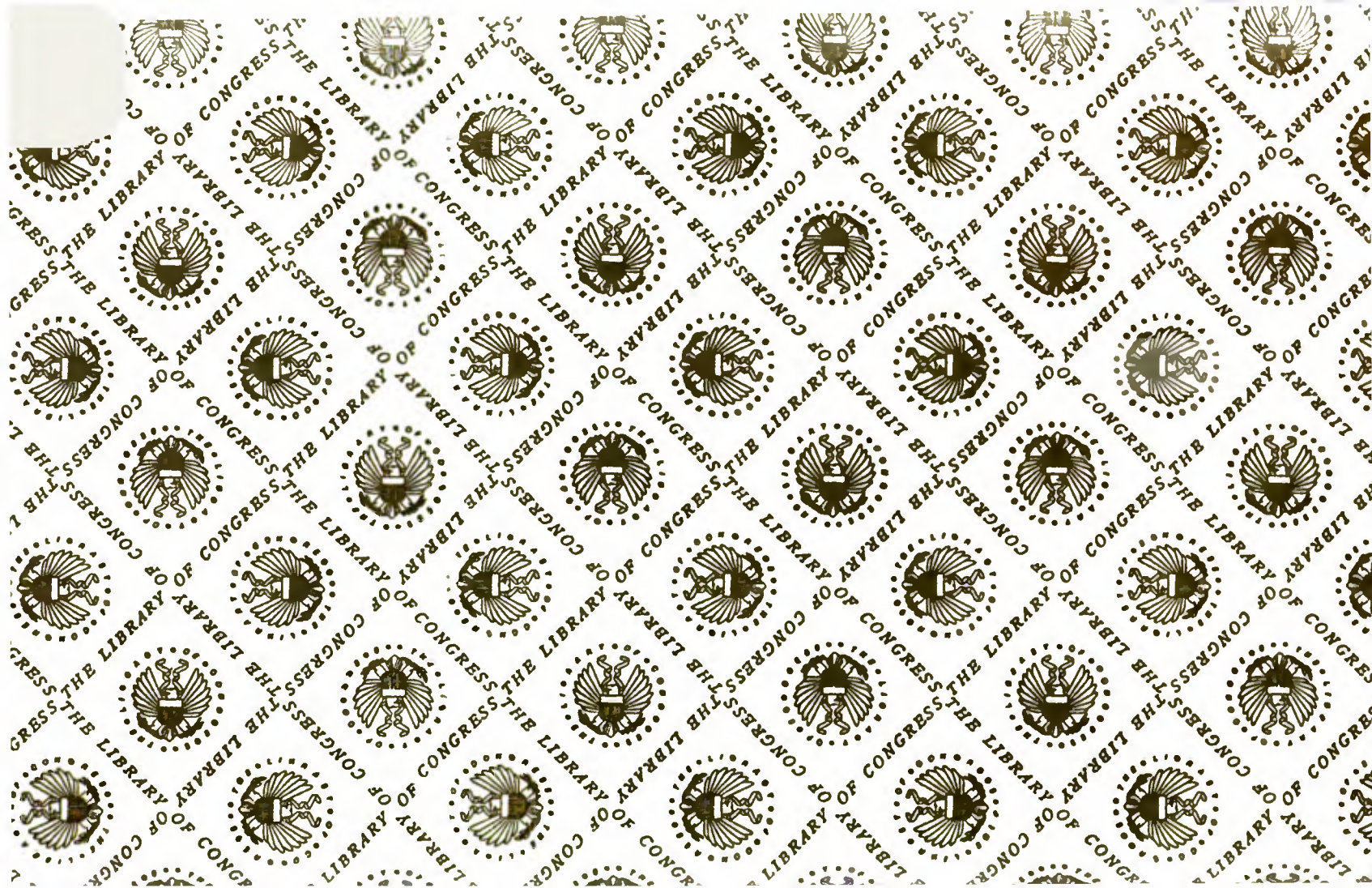
Mr. STEWART. Yes, that's our hope. But I might add in answer to a question you didn't exactly ask—our experiences aren't such that—we had hoped that a lot of other people would follow our study with similar studies, and feel reasonably certain people aren't going to want to do that.

Mr. SCHUMER. That is a pretty fair assumption.

Mr. Chairman, thank you, and I thank all three witnesses—again, all four. I think your stories are eyeopening.

Mr. EDWARDS. I certainly say amen to what Mr. Schumer said. We are very grateful for the testimony and the responses of all four witnesses.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned subject to the call of the Chair.]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